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Constitutional Dimensions of the Battered Woman Syndrome

ERICH D. ANDERSEN* AND ANNE READ-ANDERSEN**

The exclusion of expert witness testimony on the battered woman syndrome ("syndrome") in a criminal trial often raises both evidentiary and constitutional issues for appeal.[1] Defendants typically offer testimony on the syndrome to prove that they acted in self-defense when they killed or wounded their mates.[2] If the trial court excludes the testimony for lack of foundation or because it is irrelevant, for instance, this exclusion creates a potential evidentiary issue for appeal.[3] The same ruling may also raise a constitutional question because the accused has a constitutional right to present a defense.[4] The right to present a defense is implicated when the trial court excludes evidence that is favorable and material to the defense.[5]

Scholars have been attentive to the evidentiary problems associated with excluding testimony on the syndrome. Over the past decade, many commentators have considered whether, and if so when, expert testimony should be admitted to support a battered woman's assertion of self-defense.[6]

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* Associate, Davis Wright Tremaine, Seattle, Washington; B.A. 1986, J.D., 1989, University of California, Los Angeles.

** Associate, Preston, Thorgrimson, Shidler, Gates & Ellis, Seattle, Washington; B.A. 1986, College of the Holy Cross; J.D., 1989, University of Michigan.

This Article is dedicated to our parents: Margaret and David Read and Lotte and David Andersen. Without their love and guidance, this Article would not have been possible. We also thank Joseph Kearney and John Mamer for their valuable editing help.

[1] *See* Thomas v. Arn, 728 F.2d 813, 815 (6th Cir. 1984) (Jones, J., concurring), *aff'd*, 474 U.S. 140 (1985); Tourlakis v. Morris, 738 F Supp. 1128 (S.D. Ohio 1990); Fennell v. Goolsby, 630 F Supp. 451 (E.D. Pa. 1985); State v. Minnis, 455 N.E.2d 209 (Ill. Ct. App. 1983); State v. Burton, 464 So. 2d 421, 428–29 (La. App. 1985).

[2] *See, e.g.*, *Tourlakis*, 738 F Supp. at 1129.

[3] *See, e.g.*, State v. Hennum, 441 N.W.2d 793 (Minn. 1989); People v. Aris, 264 Cal. Rptr. 167 (Cal. Ct. App. 1989).

[4] *See supra* note 1.

[5] *See* Washington v. Texas, 388 U.S. 14, 19 (1967).

[6] *See, e.g.*, Loraine Patricia Eber, *The Battered Wife's Dilemma: To Kill or Be Killed*, 32 HASTINGS L. J. 895 (1981); Victoria Mikesell Mather, *The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony*, 39 MERCER L. REV 545

Among the questions they have considered are the following: Whether the syndrome theory is scientifically viable; whether it is beyond the ken of the jury; and whether testimony on the syndrome should be admitted in cases in which the facts fit the traditional notion of self-defense imperfectly.

In a growing number of cases, however, courts have considered whether the exclusion of testimony on the syndrome violates the accused's constitutional right to present a defense.[7] Unlike the evidentiary questions presented by the syndrome, the constitutional issues have not received much scholarly attention.[8]

There are two apparent reasons for the lack of commentary. First, there are relatively few published opinions on the constitutional issues.[9] Neither the Supreme Court nor any federal appeals court has explored these constitutional problems in any depth,[10] despite provocative language in a dissent from a denial of certiorari by the Supreme Court[11] and a thoughtful concurring

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(1988); David McCord, *Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases*, 66 OR. L. REV 19, 48–50 (1987); Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting A Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV 11 (1986); Carolyn Wilkes Kass, Comment, *The Admissibility of Expert Testimony on the Battered Woman Syndrome in Support of a Claim of Self-Defense*, 15 CONN. L. REV 121 (1982).

The most notable and cogent criticism of the syndrome theory and its evidentiary value is in David L. Faigman, Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV 619 (1986).

For a comparative law approach to the subject, see B. Sharon Byrd, *Till Death Do Us Part: A Comparative Law Approach to Justifying Lethal Self-Defense by Battered Women*, 1991 DUKE J. OF COMP. & INT'L L. 169 (1991).

[7] *See* Thomas v. Arn, 728 F.2d 813, 815 (6th Cir. 1984) (Jones, J., concurring); Tourlakis v. Morris, 738 F Supp. 1128 (S.D. Ohio 1990); Fennell v. Goolsby, 630 F. Supp. 451 (E.D. Penn. 1985); State v. Minnis, 455 N.E.2d 209 (Ill Ct. App. 1983); State v. Burton, 464 So. 2d 421, 428–29 (La. App. 1985); *see also* State v. Kelly, 478 A.2d 364, 376 n.11 (N.J. 1984) (state may not bar the introduction of expert testimony on the battered woman syndrome by stipulating that the defendant's fear of bodily harm was serious because to do so would violate the defendant's due process right to offer testimony establishing a defense).

[8] Only two recent articles touch briefly on constitutional issues related to the battered woman syndrome. *See* Charles Bleil, *Evidence of Syndromes: No Need for a "Better Mousetrap,"* 32 S. TEX. L. J. 37, 73–74 (1990) (one-page discussion of the constitutional right to present a defense in the context of syndrome evidence); Cathleen C. Herasimchuk, *A Practical Guide to the Admissibility of Novel Expert Evidence in Criminal Trials Under Federal Rule 702*, 22 ST. MARY'S L.J. 181, 199–206 (1990) (brief discussion of constitutional rights in the context of a larger discussion about expert testimony in criminal trials).

[9] *See* case listed *supra* note 7.

[10] The published opinions on this subject come from the state courts and federal district courts. *See* cases listed *supra* note 1.

[11] *See* Moran v. Ohio, 469 U.S. 948, 948 (1984) (Brennan, J. and Marshall, J., dissenting from denial of certiorari).

opinion in a Sixth Circuit case.[12] Second, the constitutional issues are a second-generation concern: they were not pertinent issues until the first-generation questions about the scientific validity and admissibility of the syndrome became reasonably well settled.[13]

The significant and growing number of cases involving constitutional challenges and the emerging consensus on the scientific and legal viability of the syndrome theory indicate that the time is ripe for an examination of the constitutional dimensions of the battered woman syndrome. Parts I and II of this Article are the foundation for this discussion. Part I is an overview of the syndrome itself. Part II briefly addresses evidentiary issues, with an emphasis on the admissibility of testimony on the syndrome in nontraditional self-defense cases in which a batterer was not physically abusive at the time of or immediately prior to the woman's offense. Part III analyzes situations in which the exclusion of testimony on the syndrome may violate the defendant's constitutional right to present a defense. Part III argues that courts which exclude the testimony in certain nontraditional, self-defense cases will deny the defendant the constitutional right to present a defense. Finally, Part IV briefly considers whether an indigent defendant has a constitutional right to a state-paid expert on the syndrome.

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[12] *See* Thomas v. Arn, 728 F.2d 813, 815 (6th Cir. 1984) (Jones, J., concurring):

> In my view, the trial court's exclusion of expert testimony on the "battered wife syndrome" impugned the fundamental fairness of the trial process thereby depriving [the defendant] of her constitutional right to a fair trial. There is sufficient literature which suggests that the public and thus, juries, do not understand the scope of the problem concerning battered women. Furthermore, they tend to be unsympathetic toward battered women. They fail to understand, for instance, why battered women do not leave their partners. Ascertaining a battered woman's state of mind is crucial to a determination of this and other aspects of her behavior. It may bear on the responsibility or lack of it, for her response. In my opinion the expert testimony could have clarified the unique psychological state of mind of the battered woman and should have been admitted by the trial judge. The law cannot be allowed to be mired in antiquated notions about human responses when a body of knowledge is available which is capable of providing insight.

Id. (citations omitted).

[13] Rock v. Arkansas, 483 U.S. 44 (1987), demonstrates how scientific acceptance of a theory plays a role in determining the strength of a constitutional challenge to the exclusion of testimony on the subject of the science. In *Rock*, a majority of the Supreme Court agreed with the defendant that she had a constitutional right to present her own hypnotically-refreshed testimony in her defense. The Court emphasized that even though hypnosis is an inexact science, still in its infancy, it nevertheless is a valid therapeutic technique. *Id.* at 58. The dissent, however, focused on the fact that there is no general consensus on the reliability of hypnotically-refreshed testimony and, therefore, it was reasonable for Arkansas to exclude it in all cases. *Id.* at 62.

I. CHARACTERISTICS OF THE SYNDROME

Over the past twenty-five years, researchers have come to recognize that domestic abuse is a widespread phenomenon in our culture.[14] They estimate that between 1.6 and 4 million women are beaten each year by their husbands or boyfriends.[15] Only a small number of these women kill their abusive mates.[16] These women often share similar psychological characteristics that have come to be known as the battered woman syndrome.[17]

Researchers have begun to understand the causes and effects of the spouse-abuse problem while they are learning of its broad scope. In early studies of domestic violence, many researchers posited that women who enter into and remain in abusive relationships are masochistic.[18] Subsequent studies rejected the notion that abused women remain in abusive relationships to exorcise

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[14] *See generally* Nan Oppenlander, *The Evolution of Law and Wife Abuse*, 3 LAW & POLICY Q. 382 (1981); Eber, *supra* note 6, at 897–99; Rosen, *supra* note 6, at 11–12.

[15] Straus and Gelles conservatively estimate that 1.6 million women suffer abuse by an intimate partner each year. Straus & Gelles, *Societal Change and Change in Family Violence from 1975 to 1986 as Revealed by Two National Surveys*, 48 J. OF MARRIAGE AND THE FAMILY 465, 465–79 (1986). Other researchers have estimated that this number may be two to four million. *See* Kerry A. Shad, Comment, State v. Norman: *Self-Defense Unavailable to Battered Women Who Kill Passive Abusers*, 68 N.C.L. REV 1159, 1164 n.39 (1990).

[16] According to the Philadelphia-based National Clearinghouse for Defense of Battered Women, 800 to 1,000 of those battered women will be charged with the murder of an abusive husband or boyfriend. Georgia Sargeant, *'Battered Woman Syndrome' Gaining Legal Recognition*, TRIAL, April 1991 at 17.

[17] The American Psychological Association has filed several amicus curiae briefs in criminal cases, urging that expert testimony on the syndrome be admitted. *See* Lenore E. Walker, *Battered Women, Psychology, and Public Policy*, 39 AM. PSYCHOLOGIST 1179, 1179–82 (1984).

[18] *See* R. EMERSON DOBASH & RUSSELL DOBASH, VIOLENCE AGAINST WIVES 134–37 (1979); John R. Lion, *Clinical Aspects of Wife Battering, in* BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE 126 (M. Roy ed. 1977); SHIRLEY PANKEN, JOY OF SUFFERING (1973); Laurie Wardell, et al., *Science and Violence Against Wives, in* THE DARK SIDE OF FAMILIES 69, 74–75 (1983); Paul E. Kaunitz, *Sadomasochistic Marriages*, 11 MED. ASPECTS OF HUMAN SEXUALITY 66, 66–80 (1977); John E. Snell, et al., *The Wifebeater's Wife: A Study of Family Interaction*, 11 ARCHIVES OF GENERAL PSYCHIATRY 107, 107–12 (1964).

In People v. Powell, 442 N.Y.S.2d 645 (App. Div. 1981), for example, the defendant was portrayed at trial as a willing participant in her physical and sexual abuse. The appellate court affirmed the defendant's second degree murder conviction, finding that portraying the abuse as a normal part of the marital relationship was a valid way to rebut the defendant's contention that the victim was a violent man whom she feared. *See also* State v. Griffiths, 610 P.2d 522, 543 (Idaho 1980) (in closing argument, prosecutor asked the jury: "If Joe was that bad, . . . why didn't the defendant divorce him? Why didn't she just leave him?").

neurotic conflict.[19] These later studies have validated the theory that many complex factors are often present in battering relationships.[20]

The syndrome has roots extending far below the surface of the domestic relationship into the past of the abuser and the abused. Many women who remain in abusive relationships were raised in families in which the use of violence was accepted; often their abusive mates were also raised in abusive homes.[21] In addition, battered women tend to have traditional views of marriage, seeing their husbands or boyfriends as rightfully dominant.[22]

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[19] Many of the groundbreaking studies were published in the 1970s. *See generally* RICHARD J. GELLES, THE VIOLENT HOME: A STUDY OF PHYSICAL AGGRESSION BETWEEN HUSBANDS AND WIVES (1971); ROGER LANGLEY & RICHARD C. LEVY, WIFE BEATING: THE SILENT CRISIS (1977); DEL MARTIN, BATTERED WIVES (1976); BATTERED WOMEN: A PSYCHOLOGICAL STUDY OF DOMESTIC VIOLENCE (M. Roy ed. 1977); LENORE E. WALKER, THE BATTERED WOMAN (1979) [hereinafter, WALKER, THE BATTERED WOMAN].

[20] *See* Karen E. Kosloff, *The Battered Woman: A Developmental Perspective*, 54 SMITH COLLEGE STUDIES IN SOCIAL WORK 181, 181–203 (1984) (overview of literature concerning battered woman syndrome from a developmental perspective).

[21] Maria Roy, *A Current Survey of 150 Cases*, *in* BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLANCE (M. Roy ed. 1977); MURRAY A. STRAUS, ET AL., BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY (1980); Margaret Elbow, *Theoretical Considerations of Violent Marriages*, 58 SOCIAL CASEWORK 515, 515–26 (1977); John P Flynn, *Recent Findings Related to Wife Abuse*, 58 SOCIAL CASEWORK 13 (1977); J.J. Gayford, *Wife Battering: A Preliminary Review of 100 Cases*, 1 BRITISH MEDICAL J. 194, 194–97 (1975); Richard J. Gelles, *Abused Wives: Why do they Stay?*, 38 J. OF MARRIAGE AND THE FAMILY 659, 659–68 (1976); Susan E. Hanks & C. Peter Rosenbaum, *Battered Women: A Study of Women Who Live with Violent Alcohol-Abusing Men*, 47 AM. J. OF ORTHOPSYCHIATRY 291 (1977); Elaine Hilberman & Kit Munson, *Sixty Battered Women*, 2 VICTIMOLOGY 460 (1977–78).

Batterers, too, have certain similarities in their backgrounds. They often abuse alcohol or drugs. Maria Roy, *A Current Survey of 150 Cases*, *in* BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE (M. Roy ed. 1977); J.J. Gayford, *Wife Battering: A Preliminary Review of 100 Cases*, 1 BRITISH MEDICAL JOURNAL 104, 104–97 (1975); *see, e.g.*, Fleming v. Huch, 924 F.2d 679, 679 (7th Cir. 1991) (most incidents of abuse occurred after batterer had been drinking and were followed by periods of apologetic remorse); Taylor v. Dawson, 888 F.2d 1124, 1126 (6th Cir. 1989) (batterer abused cocaine); Borders v. State, 433 So. 2d 1325, 1325–26 (Fla. Dist. Ct. App. 1983) (both victim and battered wife were alcoholics; at the time batterer was killed, his blood alcohol level was .42%).

Batterers were often abused as children. While batterers may have a history of arrests and convictions, *see, e.g.*, *Taylor*, 888 F.2d at 1126, they are not normally violent toward nonmembers of their immediate family.

[22] MILDRED D. PAGELOW, WOMAN—BATTERING: VICTIMS AND THEIR EXPERIENCES (1981).

Frequently, battered women who remain in their abusive relationships also hold strong views about the permanence of marriage.[23]

Other characteristics develop only after the battered women have been subjected to a sustained pattern of abuse by their partners.[24] These battered women are more inclined toward aggressive behavior.[25] They exhibit higher fear responses than their nonbattered counterparts.[26] For the purposes of this Article, one of the most important psychological features of battered women is "learned helplessness."

Before discussing this "learned helplessness" concept in detail, we will examine what several researchers have identified as the "cycle of violence," which explains why battered women often develop complex and counter-intuitive coping mechanisms and psychological disorders.[27] Together, the concepts of learned helplessness and the cycle of violence help explain behaviors of battered women which seem illogical to uninstructed lay observers like judges and juries.

A. *The Cycle of Violence*

The abuse often takes place in a cyclical pattern in a battering relationship.[28] There are three recognized phases in the cycle of abuse: a

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[23] *See generally*, Barbara Star, *Comparing Battered and Non-Battered Women*, 3 VICTIMOLOGY 32, 32–44 (1978).

[24] In addition to psychological disorders, battered women sometimes suffer from psychiatric disorders such as definite or possible antisocial personality disorder, major depression, and alcohol abuse and/or dependence. *See* Roger Bland & Helene Orn, *Family Violence and Psychiatric Disorder*, 31 CAN. J. PSYCHIATRY 129, 132–36 (1986).

See also Richard K. Goodstein & Ann W Page, *Battered Wife Syndrome: Overview of Dynamics and Treatment*, 138 AM. J. OF PSYCHIATRY 1036, 1037 (1981) (discussing Yale study that found 65% of battered women in study group had a history of some psychiatric treatment).

[25] Debra A. Dalton & James E. Kanter, *Aggression in Battered and Non-Battered Women as Reflected in the Hand Test*, 53 PSYCHOL. REP. 703, 703–09 (1983).

[26] Irene Gianakos & Edwin E. Wagner, *Relations Between Hand Test Variables and the Psychological Characteristics and Behaviors of Battered Women*, 51 J. OF PERSONALITY ASSESSMENT 221, 221–27 (1987).

[27] *See* WALKER, THE BATTERED WOMAN *supra* note 19, at 55; R. Emerson Dobash, et al., *Wifebeating: The Victims Speak*, 2 VICTIMOLOGY 608, 608–22 (1978); Kathleen J. Ferraro & John M. Johnson, *How Women Experience Battering: The Process of Victimization*, 30 SOCIAL PROBLEMS 325, 325–39 (1983); Laura Wetzel & Mary Anne Ross, *Psychological and Social Ramifications of Battering: Observations Leading to a Counseling Methodology for Victims of Domestic Violence*, 61 PERS. & GUIDE. J. 423, 423–28 (1983).

[28] *See* LENORE E. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS 42 (1989) [hereinafter, WALKER, TERRIFYING LOVE].

tension-building phase, an acute battering incident, and a period of contrition by the battering partner.[29]

During the tension-building phase, abuse is manifested only in "mild" forms: pinching, slapping, and verbal or psychological abuse.[30] This phase may conceivably last as long as ten years.[31] The battered woman often reacts to this abuse by becoming docile, placating her partner, or by making studied attempts to avoid him.[32] The battered woman's chief goal during this stage of the cycle is to prevent the violence from escalating into a full-blown battering incident.[33] It is during this period that a woman may attempt to escape from her batterer.[34]

At a certain point, and often due to an unpredictable provocation, the tension comes to a head and an acute battering incident results. This part of the cycle is brief; it may last between two and twenty-four hours.[35] The victim may sometimes intentionally provoke the acute battering incident in order to get it over with, in the belief that a violent confrontation is inevitable.[36] The viciousness and savagery of the acute battering incident is far removed from the relatively minor abuse that takes place during the tension-building phase.[37] While bruises are the most common injuries resulting from one of these incidents, the battered woman may also sustain broken bones or internal injuries.[38] Sometimes guns, knives, and other weapons are involved.[39] The victim may be raped or subjected to other severe sexual abuse during an acute battering incident.[40] If possible, the victim will avoid medical treatment or put

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[29] *Id.*

[30] *See id.*

[31] *See* WALKER, THE BATTERED WOMAN, *supra* note 19, at 58.

[32] *See* WALKER, TERRIFYING LOVE, *supra* note 28, at 42–43.

[33] *Id.* at 43.

[34] Lenore E. Walker, et al., *Beyond the Juror's Ken: Battered Women*, 7 VT. L. REV 1, 6 (1982) [hereinafter Walker, *Beyond the Juror's Ken*].

[35] *See* WALKER, THE BATTERED WOMAN, *supra* note 19, at 60.

[36] *Id.*

[37] WALKER, TERRIFYING LOVE, *supra* note 28, at 43.

[38] *See, e.g.*, State v. White, 414 N.E.2d 196, 198 (Ill. Ct. App. 1980) (in successive incidents of abuse, the batterer broke girlfriend's ankle, dislocated her elbow, struck her in the face with a bottle, hit her on the head with a car jack, and broke four of her ribs, for which she required medical treatment at least six times).

[39] *See, e.g.*, Tourlakis v. Morris, 738 F Supp. 1128, 1130 (S.D. Ohio 1990) (batterer held straight razor to his girlfriend's throat); Fennell v. Goolsby, 630 F Supp. 451, 457 (E.D. Pa. 1985) (batterer burned his wife with a cigarette and threatened her with a knife); People v. Hare, 782 P.2d 831, 831 (Colo. 1989) (batterer repeatedly pointed loaded gun between his girlfriend's eyes and threatened to kill her); Commonwealth v. Stonehouse, 555 A.2d 772, 775–76 (E.D.Pa. 1989) (batterer tried to run down former girlfriend with his car and turned on the gas in her apartment while she slept).

[40] Marital rape is not uncommon in abusive relationships. *See, e.g.*, *Fennell*, 630 F.Supp. at 457 (wife raped by husband in hospital while she was recovering from surgery);

it off as long as possible.[41] Her goal at this stage is to cope with and survive the situation rather than escape it.[42] After the battered woman is repeatedly subjected to the cycle of violence, she comes to believe that her batterer is omnipotent,[43] and that no one can help her.[44]

The tension between the partners often dissipates after the severe beating incident and the final phase of the cycle begins. The batterer becomes loving and nurturing toward his mate, trying to make amends for the pain he has caused her.[45] The batterer begs forgiveness and promises to change.[46] For the battered woman, the partner's behavior reinforces the reasons she was first attracted to him and the reasons she loves him.[47] This period of loving contrition inevitably deteriorates, however, and the tension-building cycle

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see also ANGELA BROWNE, WHEN BATTERED WOMEN KILL 95–103 (1987); Mather, *supra* note 6, at 555 (citing LENORE E. WALKER, THE BATTERED WOMAN SYNDROME 149 (1984).

[41] WALKER, TERRIFYING LOVE, *supra* note 28, at 44.

[42] *See* Walker, *Beyond the Juror's Ken*, *supra* note 34, at 6. A battered woman will frequently also hide from her friends and family while healing from a severe battering incident, perhaps out of shame. *See* Sargeant, *supra* note 16, at 17.

[43] This belief in the batterer's omnipotence may survive even the batterer's own death. *See* People v. Hare, 782 P.2d 831 (Colo. 1989) (it took hours for defendant to realize her batterer was dead); State v. Minnis, 455 N.E.2d 209, 215 (Ill. Ct. App. 1983) (syndrome evidence admitted to show defendant dismembered husband's body to prevent him from coming back to life to retaliate); *see also* Mather, *supra* note 6, at 554 n.71.

[44] Walker, *Beyond the Juror's Ken*, *supra* note 34, at 8–9.

This is often a very real fear. The police are frequently of little help in discouraging further battering, because the batterer is often not arrested and the police are unable or unwilling to provide protection to the victim of the abuse. Battered women in California and New York instituted class actions against the police, alleging that the police customarily denied women protection by refusing to assist battered women or arrest their husbands. *See* Scott v. Hart, No. C-76-2395 (N.D. Cal. Oct. 28, 1976) (unpublished opinion); Bruno v. Codd, 396 N.Y.2d 974 (N.Y. Sup. Ct. 1977), *aff'd*, 393 N.E.2d 976 (N.Y. 1979). Both lawsuits were resolved by consent decree. *See generally* Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV 267 (1985).

[45] WALKER, TERRIFYING LOVE, *supra* note 28, at 44.

[46] *See, e.g.*, Chapman v. State, 386 S.E.2d 129, 130 (Ga. 1989) ("During the courtship and their marriage, the deceased would frequently beat [defendant] Chapman, and he would apologize and say that he would not do it again."); WALKER, TERRIFYING LOVE, *supra* note 28, at 44.

[47] A battered woman's reluctance to leave the relationship may be the result of intermittent reinforcement: the pleasures of the contrition period may provide enough positive reinforcement to keep the battered woman in the relationship despite the abuse. Grace M. Long & J. Regis McNamara, *Paradoxical Punishment as It Relates to the Battered Woman Syndrome*, 13 BEHAVIOR MODIFICATION 192, 197 (1989); WALKER, TERRIFYING LOVE, *supra* note 28, at 47.

begins anew. As the cycles recur within the abusive relationship, the violence escalates in severity and acute beatings occur more frequently [48]

B. *"Learned Helplessness"*

Another hallmark of the battered woman syndrome is "learned helplessness."[49] This condition has been described by one court as a "psychological torpor."[50] Battered women manifest learned helplessness after they have been subjected to random, variable abuse with or without provocation. Because the battered woman is unable to predict the effect her actions might have on her battering spouse, she eventually learns that she has no control over the situation or escape from the pain.[51] Reacting with passivity becomes her best defense.

Though it may seem to outsiders that the battered woman could simply leave her lover or spouse, a victim of battered woman syndrome does not perceive that to be an option.[52] The battered woman's belief that escape from

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[48] *See* WALKER, THE BATTERED WOMAN SYNDROME, *supra* note 40, at 43–44, 150 (citing *"Wife Beating: The Silent Crime,"* TIME, Sept. 5, 1983, at 23); Susan L. Podebradsky, & Mary E. Triggiano-Hunt, Comment, *An Overview of Defense of Battered Women From a Postconviction Perspective*, 4 WIS. WOMEN'S L.J. 95, 97 (1988).

[49] *See* WALKER, TERRIFYING LOVE, *supra* note 28, at 37. A battered woman may have developed learned helplessness as the result of earlier life experiences, through childhood abuse, perhaps, or through early socialization into strict sex roles. *Id.* The earlier a person falls into a pattern of learned helplessness, the more difficult it is for that person to terminate a violent relationship.

[50] State v. Kelly, 478 A.2d 364, 386 (N.J. 1984) (Handler, J., concurring and dissenting). Another court has succinctly described learned helplessness as "a condition in which the woman is psychologically locked into her situation due to economic dependence on the man, an abiding attachment to him, and the failure of the legal system to adequately respond to the problem." State v. Allery, 682 P.2d 312, 315 (Wash. 1984).

[51] *See* WALKER, TERRIFYING LOVE, *supra* note 28, at 50. Research performed on dogs by Martin Seligman clarified the concept of learned helplessness. In the experiments, dogs were put in cages from which they could not escape and were administered random electric shocks. The dogs learned there was nothing they could do to control the administration of the shocks and stopped trying to escape. Researchers discovered the dogs were developing coping mechanisms rather than expending energy in what they had come to learn were futile escape attempts. The dogs lay in their own excrement to partially insulate themselves from the shocks, and they chose the least conductive part of the cage to lie in. When researchers opened the cages and tried to teach the dogs to escape, the dogs resisted. They had developed a "learned helplessness" response, which was to rely on proven coping strategies rather than efforts to escape that the dogs had previously found to be ineffective. Only when the dogs were forcibly and repeatedly dragged to the cage exits did they abandon their coping strategies in favor of escape. *See id.*

[52] Case law is replete with examples of battered women who have been threatened by their abusive mates if they express an intent to leave. *See, e.g.*, Fleming v. Huch, 924 F.2d

the situation is impossible may be based in reality—the woman may truly have no place to go[53]—or she may fear worse battering if her mate finds her.[54] She may have in fact attempted to leave her batterer in the past, only to be cajoled or forced back into their home.[55] The woman's traditional family values often keep her in the relationship,[56] as does the hope that her mate will change.[57]

The battered woman's poor self-image and low self-esteem contribute to her feeling of helplessness.[58] She experiences guilt over her inability to stop or avoid the violence and may believe she is somehow at fault and deserves the

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679, 679 (7th Cir. 1991) (defendant testified that her abusive husband, upon hearing that she intended to leave him, responded, "[t]he only way you will leave me is feet first").

[53] A battered woman may, for instance, have few friends in the community, or may lack family support. It might be that her family and friends, and even the police, are hesitant to get involved in a domestic dispute. Often the batterer is jealous of any time his mate spends outside the family and will impose a forced isolation upon her, cutting off her associations with friends and family. *See* WALKER, TERRIFYING LOVE, *supra* note 28, at 76, 103. In addition, the battered woman may lack financial resources, though this is not universally true. *See* WALKER, TERRIFYING LOVE, *supra* note 28, at 106, 113.

[54] Cynthia L. Coffee, Note, *A Trend Emerges: A State Survey on the Admissibility of Expert Testimony Concerning the Battered Woman Syndrome*, 25 J. FAM. L. 373, 379 n.40 (1986). In fact, in a majority of spousal homicide cases, police have previously been summoned to the home. Margaret Howard, *Husband-Wife Homicide: An Essay from a Family Law Perspective*, 49 J. LAW & CONTEMP. PROBS. 63, 69–70 (1986). Clearly, involving the authorities does not guarantee protection from further, or even heightened, abuse.

Statistics show that police do not make arrests as often in domestic assault cases as they do in nondomestic assaults. *See* Watson v. Kansas City, 857 F.2d 690, (10th Cir. 1988); *see also* Commonwealth v. Stonehouse, 555 A.2d 772 (Pa. 1989) (batterer and girlfriend were both police officers; other officers repeatedly declined to file reports against batterer when summoned to the scene of an abusive incident).

The lack of police protection may stem in part from the fact that, as studies in England have shown, police are among those groups with the highest incidence of wife beating. *See* WALKER, THE BATTERED WOMAN, *supra* note 19, at 24.

[55] There is a good chance that the abusive partner has threatened to kill or maim the woman if she attempts to leave him. *See, e.g.*, WALKER, TERRIFYING LOVE, *supra* note 28, at 47; Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV WOMEN'S L.J. 121, 133–34 (1985). Experts in the field have compiled many case histories replete with instances in which a battered wife left her husband only to have him pursue her and subject her to an even more brutal beating. *See, e.g.*, MARTIN, *supra* note 19, at 76–79.

[56] The stigma of divorce and the humiliation of having "failed" in marriage reinforce these traditional values. *See* MARTIN, *supra* note 19, at 81–83. Spouse abuse, contrary to what one might expect, is not confined to any single ethnic, religious or economic group; rather, it crosses socioeconomic boundaries. DANIEL J. SONKIN, ET AL., THE MALE BATTERER: A TREATMENT APPROACH 41 (1985).

[57] WALKER, TERRIFYING LOVE, *supra* note 28, at 45.

[58] *Id.* at 102.

battering.[59] Battered women also may suffer from severe stress reactions such as anxiety, depression, and general suspiciousness.[60] Fear rules battered women's lives, even during relatively calm periods in their relationships.[61] The battered woman never knows what might trigger another battering incident.

C. *Defining the "Syndrome" and Counteracting the Myth of the Battered Woman*

The term "battered woman"[62] was defined by Lenore Walker, one of the foremost researchers in the field of domestic violence, as one who has repeatedly been physically, sexually, or seriously psychologically abused by her partner in an intimate relationship.[63] The abuse is often a result of the husband's or lover's attempt to coerce the woman into doing that which she does not want to, without regard for the woman's rights or wishes.[64] The woman must have undergone the "cycle of violence" at least two times to be considered a battered woman.[65] The definition of a battered woman and the diagnosis of the syndrome of which she is a victim emphasize the normalcy of her reaction to the continued abuse. The syndrome has been termed "a terrified human being's *normal* response to an abnormal and dangerous situation."[66]

Because the psychological reality for battered women greatly differs from the myths and misunderstandings about them, eyewitness testimony as to the abuse they have suffered generally is not enough to explain the battered woman's reaction to the abuse. Expert testimony on the syndrome can be crucial when the mental state of the battered woman is at issue in a trial.[67]

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[59] *Id.* at 102–03.

[60] *See* WALKER, THE BATTERED WOMAN, *supra* note 19, at 31–35.

[61] *See, e.g.*, Smith v. State, 277 S.E.2d 678, 680 (Ga. 1981).

[62] The term "battered woman" should perhaps be changed to "battered spouse" or "battered mate" to account for its current usage. At least one male defendant has attempted to introduce battered spouse syndrome in his defense. *See* State v. Feltrop, 803 S.W.2d 1 (Mo. 1991). Evidence of the syndrome is not limited to heterosexual relationships, either. In Los Angeles Municipal Court, a woman was charged with the assault of her lesbian lover. The prosecution presented evidence of the battered woman syndrome to explain why the victim first reported the battering, then recanted her story after reconciling with the batterer. *See Lesbian Convicted of Beating Her Lover*, LOS ANGELES TIMES, Oct. 30, 1990, at B2, col. 1.

[63] *See* WALKER, TERRIFYING LOVE, *supra* note 28, at 35, 102.

[64] *Id.* at 35.

[65] *See* WALKER, THE BATTERED WOMAN, *supra* note 19, at 70.

[66] WALKER, TERRIFYING LOVE, *supra* note 28, at 180.

[67] Some feminist scholars note that such myths include that battered women voluntarily participate in and enjoy battering relationships, that the beatings are probably justified, and that police provide adequate protection for battered women. *See* Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV C.R.-C.L. L. REV 623, 625 (1980). *See generally*, WALKER, THE BATTERED WOMAN, *supra* note

Testimony regarding learned helplessness can help explain to a jury why a battered woman did not seek help after an acute battering incident. Without the testimony, prosecutors may successfully use a defendant's failure to seek help as evidence that the abuse was less severe than the battered woman claims.[68] Expert testimony on the syndrome can also explain why the woman did not simply leave her lover or spouse. The woman's perception of being trapped, as well as her belief that her batterer would follow and retaliate against her for having left him, becomes understandable to a jury when put in context by syndrome testimony.[69] An expert could explain why a woman under such circumstances might feel in extreme danger even when an abusive partner does not have a weapon in hand.[70] An explanation of the spiraling violence in an abusive relationship also puts the battered woman's perception of imminent harm in the proper context.

II. INTRODUCTION OF SYNDROME TESTIMONY AT TRIAL

Testimony on the battered woman syndrome[71] was not introduced in criminal trials until the latter half of the 1970s.[72] The timing of this event was no coincidence. It was only then that the women's movement began putting labels like "battering" and "marital rape" on behaviors that, only a few years before, went unstudied and undiscussed in academic circles.[73] It was also at

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19, at 18–30 (discussing myths about battered women). *But see* James R. Acker & Hans Toch, *Battered Women, Straw Men, and Expert Testimony: Comment on* State v. Kelly, 21 CRIM. L. BULL. 125, 139 (1985) (arguing that Lenore Walker's "myths" may themselves be mythical).

[68] *See* Crocker, *supra* note 55, at 132–34.

[69] *See infra* notes 101–39 and accompanying text.

[70] *See* Crocker, *supra* note 55, at 134–35 (noting that because a battered woman has been exposed over and over to the batterer's abuse, she can recognize the signs of a particularly intense attack; furthermore, she may feel a need to use extreme force because her choices are to be completely passive or to stop the beating altogether); *see also* People v. Torres, 488 N.Y.S.2d 358 (N.Y. Sup. Ct. 1985) (savagery of victim's beating convinced defendant he would kill her this time; while he rested, she shot and killed him).

[71] The battered woman syndrome has been given different names by courts. *See, e.g.*, State v. Dannels, 734 P.2d 188 (Mont. 1987) ("abused spouse syndrome"); State v. Baker, 424 A.2d 171, 173 (N.H. 1980) ("battered wife syndrome"); State v. Felton, 329 N.W.2d 161, 163 (Wis. 1983) ("battered spouse syndrome").

[72] *See* Rosen, *supra* note 6, at 14–15. Prior to the studies on battered woman syndrome in the late 1970s, most women who killed their abusers either pleaded not guilty by reason of insanity or simply pleaded guilty to the charge. *See* Elizabeth M. Schneider & Susan B. Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4 WOMEN'S RTS. L. REP 149, 149 (1978) (noting that most women who claimed insanity were routinely convicted).

[73] KERSTI YLLO & MICHELE BOGRAD, FEMINIST PERSPECTIVES ON WIFE ABUSE 11 (1988).

this time that the National Organization for Women established a Task Force on Battered Women and Household Violence.[74] Shelters and support groups for victims of domestic violence sprang up around the country as the specter of intrafamily violence was brought to light.[75]

Despite its relatively recent introduction into the criminal justice system, however, the syndrome figures into many cases today.[76] Testimony on the syndrome may be used to show that the battered-woman defendant was insane at the time she assaulted or killed her mate.[77] It may also be introduced to show that the defendant had "diminished responsibility,"[78] or that there was an "apparent necessity"[79] for the crime.[80] The defendant may also seek to introduce syndrome testimony simply to support her credibility.[81] Syndrome testimony is presented most often, however, in criminal trials to prove that the defendant acted in self-defense when she used physical force against her husband or lover with fatal results.[82]

In order to admit syndrome testimony for any of these purposes, a defendant must clear several evidentiary hurdles. The issue of whether expert testimony on the syndrome is admissible is usually addressed in an evidentiary

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[74] SUSAN SCHECTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 1-2, 53-58 (1982).

[75] YLLO & BOGRAD, *supra* note 73, at 11.

[76] Syndrome testimony has even found its way into civil trials. See Curtis v. Curtis, No. 14514 (Blaine County Dist. Ct., May 18, 1990) (plaintiff sued former live-in boyfriend for battery and intentional infliction of emotional distress; was awarded compensatory and punitive damages); Matsumoto v. Matsumoto, No. 603054 (Cal. San Diego Super. Ct. November 2, 1990) (wife brought personal injury claim against husband after two years of abuse; was awarded substantial compensatory damages). *See generally* Sargeant, supra note 16, at 18-19.

[77] *See* Schneider, *supra* note 67, at 630. When a defendant uses syndrome testimony to prove that she is not guilty by reason of insanity, she faces the possibility of confinement in a mental hospital, which is obviously a risk best avoided if another use of the testimony is possible. *See* Rocco C. Cipparone, Comment, *The Defense of Battered Women Who Kill*, 135 U. PA. L. REV 427, 445 (1987).

[78] *See* C.T. Drechsler, Annotation, *Mental or Emotional Condition as Diminishing Responsibility for Crime*, 22 A.L.R.3d 1228 (1968 & Supp. 1991) (collecting cases).

[79] *See, e.g.*, People v. Hare, 782 P.2d 831 (Colo. Ct. App. 1989).

[80] Many states, however, do not recognize such defenses and consequently do not admit syndrome testimony to prove them. *See e.g.*, State v. Burton, 464 So. 2d 421, 427 (La. Ct. App. 1985) (Louisiana does not recognize doctrine of diminished responsibility).

[81] *See, e.g.*, Arcoren v. United States, 929 F.2d 1235, 1237-38 (8th Cir. 1991) (battered woman stated at scene of her rape and before grand jury that intercourse was non-consensual; prosecution sought at trial to use testimony on the syndrome to show why she recanted at trial); Fennell v. Goolsby, 630 F.Supp. 451, 460-61 (E.D. Pa. 1985); State v. Dannels, 734 P.2d 188 (Mont. 1987); State v. Kelly, 478 A.2d 364, 378 (N.J. 1984) (testimony on syndrome could reinforce defendant's credibility by explaining why she failed to escape the abuse); State v. Hanson, 793 P.2d 1001 (Wash. Ct. App. 1990).

[82] *See, e.g.*, Cipparone, *supra* note 77, at 428.

hearing on a motion in limine.[83] At this hearing, the defendant must make a formal offer of proof[84] as to her ability to establish, through her own testimony or that of other witnesses, that she is a "battered woman,"[85] that the proposed "expert" is qualified to give his or her expert opinion,[86] and that the particular testimony is relevant and otherwise admissible. A land mine for the defendant may lie under each one of these evidentiary and procedural steps.

Initially, courts often excluded testimony on the syndrome because it did not meet the requirements for admission of expert testimony at trial.[87] In the late 1970s and early 1980s, *Dyas v. United States*[88] stated the prevailing test for introducing expert testimony at trial. Under *Dyas*, the testimony offered had to satisfy three requirements: (1) the subject matter had to be so distinctively related to some science as to be beyond the ken of the average layman; (2) the expert witness must have had sufficient knowledge and experience in that field to make it appear that his or her opinion would probably aid the trier of fact in his or her search for the truth; and (3) the state of the pertinent art or scientific knowledge must have permitted a reasonable opinion to be asserted by the expert.[89]

Courts initially were reluctant to admit expert testimony on the syndrome under the third prong of this test in the absence of solid and credible evidence that the syndrome was capable of scientific proof and definition.[90] Until the

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[83] *See, e.g.*, Pugh v. State, 401 S.E.2d 270, 271 n.1 (Ga. 1991).

[84] *See, e.g.*, State v. Martin, 666 S.W.2d 895, 899 (Mo. 1984).

[85] *See, e.g.*, Pruitt v. State, 296 S.E.2d 795 (Ga. 1982) (expert testimony excluded as irrelevant when defendant failed to demonstrate on the record that she was a battered woman).

[86] *See, e.g.*, Arcoren v. United States, 929 F.2d 1235 (8th Cir. 1991) (proposed expert who had doctorate in psychology and experience working with battered women was qualified to give expert opinion on battered woman syndrome).

[87] *See, e.g.*, Ibn-Tamas v. United States, 407 A.2d 626 (D.C. 1979).

[88] 376 A.2d 827 (D.C. 1977).

[89] *See id.*, Fennell v. Goolsby, 630 F.Supp. 451, 458 (E.D. Pa. 1985) (applying *Dyas* test).

Since *Dyas*, the relaxed requirements for expert testimony as set forth in Federal Rule of Evidence 702 have been adopted by most states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702.

See, e.g., Dianna J. Ensign, Note, *Links Between the Battered Woman Syndrome and the Battered Child Syndrome: An Argument for Consistent Standards in the Admissibility of Expert Testimony in Family Abuse Cases*, 36 WAYNE L. REV 1619, 1631 (1990).

[90] *See, e.g.*, State v. Thomas, 423 N.E.2d 137 (Ohio 1981), *overruled by* State v. Koss, 551 N.E.2d 970 (Ohio 1990). The scientific credibility of a field is most often judged by the number of published articles on the subject, the number of cases that have allowed testimony based upon the theory, whether others in the field have duplicated the results of the research and testimony by others in the field, and whether the theory has gained general

scientific proof and definition of the syndrome were shown, courts also had trouble considering such testimony as being beyond the ken of the average layman.[91] The watershed case regarding the scientific recognition and acceptance of battered woman syndrome was *Ibn-Tamas v. United States*.[92] In *Ibn-Tamas*, a District of Columbia court concluded for the first time that the syndrome theory was beyond the ken of the average layman and helpful to him in his search for truth,[93] because it included concepts like "learned helplessness" that belied common misconceptions about battered women and because it was well supported by credible scientific research.[94] Since *Ibn-Tamas*, most states have come to accept the conclusion that the syndrome is worthy of expert testimony at trial.[95]

As the syndrome itself has become accepted, the next barrier to the admission of syndrome testimony generally arises from rulings on the relevancy of the testimony.[96] It is clear that if the defendant is unable to establish that she was physically, sexually, or psychologically abused by the

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acceptance. *See* Meredith Brinegar Cross, Comment, *The Expert as Educator: A Proposed Approach to the Use of Battered Woman Syndrome Expert Testimony*, 35 VAND. L. REV 741, 745 (1982); *see also* Michael A. Buda & Teresa L. Butler, *The Battered Wife Syndrome: A Backdoor Assault on Domestic Violence*, 23 J. FAM. L. 359, 387 n.99 (1985).

[91] *See* Pugh v. State, 401 S.E.2d 270 (Ga. 1991); Buhrle v. State, 627 P.2d 1374 (Wyo. 1981).

[92] 407 A.2d 626 (D.C. 1979).

[93] One feminist theorist suggests that "[t]he decision to exclude expert testimony in [cases involving rape trauma syndrome and battered woman syndrome] reflects an assumption that issues of importance to women are simple, 'common' matters that everyone understands, rather than 'technical,' male issues that might require expert testimony." Kit Kinports, *Evidence Engendered*, 1991 U. ILL. L. REV 413, 444 (1991).

[94] *See supra* Part I.

[95] *See, e.g.*, State v. Kelly, 478 A.2d 364 (N.J. Ct. App. 1984); Commonwealth v. Stonehouse, 555 A.2d 772 (Pa. 1989); State v. Hanson, 793 P.2d 1001 (Wash. Ct. App. 1990) ("the scientific basis and relevancy of such testimony in proper cases is now well established"); *cf.* Moran v. Ohio, 469 U.S. 948 (1984) (Brennan, J., dissenting from denial of certiorari) (recognizing the validity of battered woman syndrome evidence "even where traditional self-defense theory may seem to fit the situation only imperfectly"). *But see* State v. Thomas, 423 N.E.2d 137 (Ohio 1981) (state of art not sufficiently developed to warrant testimony under guise of expertise), *overruled by* State v. Koss, 551 N.E.2d 970 (Ohio 1990) (battered woman syndrome now a matter of commonly accepted scientific knowledge, and therefore admissible to prove self-defense); Fielder v. State, 683 S.W.2d 565 (Tex. Ct. App. 1985) (reasonable person's perception of fear is within ken of average juror), *rev'd*, 756 S.W.2d 309 (Tex. Crim. 1988); Buhrle v. State, 627 P.2d 1374 (Wyo. 1981) (defendant failed to demonstrate that state of the art would permit reasonable expert opinion).

[96] *See, e.g.*, *Kelly*, 478 A.2d at 373. In determining relevance, a court must decide whether the evidence renders an inference desired by the offering party more probable than it would be without the evidence. FED. R. EVID. 401.

victim, syndrome testimony is without foundation and irrelevant.[97] The relevancy determination becomes more complicated, however, when the defendant establishes that she is a battered woman but offers syndrome testimony in a nontraditional, self-defense case. When the underlying evidence reveals, for instance, that a batterer was at rest or asleep at the time of the offense, many courts have excluded syndrome testimony when offered to prove that the defendant acted in self-defense.[98]

This reluctance is best explained by reference to the legal requirements for self-defense. To establish a valid claim of self-defense, the accused must show that (1) she reasonably believed herself to be in imminent danger of death or great bodily harm at the time of the offense;[99] (2) she used no more than the

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[97] *See, e.g.*, Pruitt v. State, 296 S.E.2d 795 (Ga. 1982).

[98] *See, e.g.*, People v. Aris, 264 Cal.Rptr. 167, 171 (Cal. Ct. App. 1989) (defendant killed sleeping husband after he severely beat her); Chapman v. State, 367 S.E.2d 541, 542 (Ga. 1988) (battered wife shot husband while he was bathing); Fultz v. State, 439 N.E.2d 659 (Ind. App. 1982) (batterer shot while sitting on couch); State v. Nunn, 356 N.W.2d 601 (Iowa Ct. App. 1984) (battered wife killed husband while sleeping); State v. Hundley, 693 P.2d 475, 475–76 (Kan. 1985) (battered wife shot husband while he sat on bed across room); State v. Gallegos, 719 P.2d 1268 (N.M. 1986) (battered wife shot husband while he rested after beating her); People v. Emick, 481 N.Y.S.2d 552, 558 (N.Y. App. Div. 1984) (defendant killed sleeping husband following hours of abuse); People v. Torres, 488 N.Y.S.2d 358, 360–61 (N.Y. Sup. Ct. 1985) (battered wife shot husband in back while he sat in chair); People v. Powell, 424 N.Y.S.2d 626, 628–29 (N.Y. Sup. Ct. 1980) (defendant killed her ex-husband as he slept after being held at gunpoint by him), *aff'd*, 442 N.Y.S.2d 645 (N.Y. App. Div. 1981); State v. Leidholm, 334 N.W.2d 811 (N.D. 1983) (battered wife stabbed husband while sleeping after night of abuse); Commonwealth v. Grove, 526 A.2d 369, 372 (Pa. Super. Ct. 1987) (battered wife shot husband while he was sleeping); State v. Aucoin, 756 S.W.2d 705 (Tenn. 1988) (battered woman shot batterer while he slept); State v. Allery, 682 P.2d 312, 313–14 (Wash. 1984) (after finding her estranged husband in her house despite restraining order, defendant killed husband as he rested, based on prior death threats by him); State v. Felton, 329 N.W.2d 161, 164–65 (Wis. 1983) (defendant killed sleeping husband following years of abuse of her and her children).

[99] States may have either an objective, "reasonable man" standard by which to judge the reasonableness of the actor's fear or a subjective standard, by which only the defendant's actual fear is assessed in determining whether she acted in self-defense. The objective standard is heavily criticized by commentators, *see, e.g.*, Shad, *supra* note 15, at 1169, and was even the basis for reversing a defendant's conviction in State v. Wanrow, 559 P.2d 548 (Wash. 1977). In states that still use an objective standard, it would seem incompatible to admit testimony regarding the reasonableness of an abused woman's fear of her mate. At least one court has acknowledged, however, that in most states which employ the objective standard, courts still take into consideration characteristics of the defendant which might engender reasonable fear in a battered woman. *See* Commonwealth v. Watson, 431 A.2d 949, 952 (Pa. 1981). The *Watson* court recognized that the objective versus subjective test for reasonableness is a sort of fiction. After *Watson*, Pennsylvania adopted an "objective" standard which takes into account how a reasonably prudent battered woman would have perceived and reacted to the victim's behavior. *See* Commonwealth v. Stonehouse, 555 A.2d 772, 784 (Pa. 1989). Similarly, New Mexico has adopted a "hybrid"

amount of force necessary in order to save herself from the perceived imminent danger; (3) she was not the aggressor; and (4) she did not violate any duty to retreat from or avoid the danger.[100] Expert testimony on battered woman syndrome can be used to support most of these elements of a self-defense claim.

The expert testimony may explain why a battered woman reasonably believed that she was in imminent danger of death or great bodily harm at the time of the offense.[101] Specifically, it can show how her experience with the cycle of violence and prolonged abuse shaped her perception of the situation.[102] The syndrome theory explains a reasonable person's response to sustained abuse; however, it is also relevant to the question of whether the defendant's actions were reasonable under the circumstances.[103] Testimony on learned helplessness can help jurors understand why a battered woman resorted to deadly violence rather than trying to escape from or avoid the perceived

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standard of reasonableness for use in such cases. *See* State v. Gallegos, 719 P.2d 1268 (N.M. 1986).

Commentators generally endorse this idea of a "reasonable battered woman" standard for use in states with an objective definition of reasonableness. *See, e.g.*, Buda & Butler, *supra* note 90, at 359; Kit Kinports, *Defending Battered Women's Self-Defense Claims*, 67 OR. L. REV. 393, 414–16 (1988); Shad, *supra* note 15, at 1173; *but see* Crocker, *supra* note 55, at 152 (arguing that this prejudices battered women who do not necessarily meet all the standard attributes of battered woman syndrome; recommends a standard of reasonableness to be used for women in general).

[100] *See* WAYNE R. LAFAVE & AUSTIN W SCOTT, CRIMINAL LAW 454 (2d ed. 1986). A homicide committed in self-defense is a justifiable homicide as opposed to an excusable homicide. *Compare, e.g.*, CAL. PENAL CODE § 195 (1991) *with* § 197 (1991). Excuses for homicide include accident and insanity. *See* PAUL H. ROBINSON, CRIMINAL LAW DEFENSES 280 (1984).

The issue is more complicated than this, however. Some states distinguish between "perfect" and "imperfect" self-defense. In California, for instance, perfect self-defense requires both subjective honesty and objective reasonableness in the belief of imminent harm. If proven, perfect self-defense completely exonerates the accused. *See* People v. Aris, 264 Cal. Rptr. 167, 172 (Cal. Ct. App. 1989). Imperfect self-defense requires only subjective honesty and negates malice aforethought, reducing the homicide to voluntary manslaughter. *Id.*

[101] *See, e.g.*, State v. Stewart, 763 P.2d 572, 577 (Kan. 1988) (syndrome testimony "relevant to determination of the reasonableness of the defendant's perception of danger"); State v. Leidholm, 334 N.W.2d 811, 816–17 (N.D. 1983). *But see* People v. Aris, 264 Cal. Rptr. 167, 173 (Cal. Ct. App. 1989) (testimony relevant to issue of subjective belief, but not relevant to issue of objective reasonableness).

[102] *See, e.g., Aris*, 264 Cal. Rptr. at 173.

[103] *See supra* Part IC. *See also Stewart*, 763 P.2d at 577; State v. Kelly, 478 A.2d 364, 375–77 (N.J. Ct. App. 1984); People v. Torres, 488 N.Y.S.2d 358, 369 (N.Y. Sup. Ct. 1985).

danger.[104] Syndrome testimony can also account for the failure to seek help and for delay in reporting abuse.[105] The cycle theory of violence can explain why a battered woman's use of deadly force was not excessive.[106]

In traditional self-defense cases, many courts have recognized that syndrome testimony is relevant for these purposes and should be admitted. In *State v. Kelly*,[107] for example, the evidence showed that the defendant had been abused by her husband for nearly all of their twenty-five year marriage.[108] On the day of the killing, Mr. Kelly attacked his wife in public, punching and hitting her, biting her leg, and choking her to near unconsciousness.[109] A crowd gathered, and the two were separated by members of the crowd.[110]

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[104] In *Kelly*, 478 A.2d at 377, for example, the court of appeals noted that at trial the prosecutor had reinforced certain myths about battered women. In cross-examining the defendant regarding occasions when the victim had temporarily moved out of the family home, the prosecutor repeatedly asked the defendant: "You wanted him back, didn't you?" *Id.* The court in *Kelly* noted that "[t]he [state's] implication was clear: domestic life could not have been too bad if she wanted him back." *Id.* The court ruled the expert testimony admissible to show the defendant's reasons for not having left her husband despite the beatings she suffered at his hands. "After hearing the expert [testimony], instead of saying Gladys Kelly could not have been beaten up so badly for if she had, she certainly would have left, the jury could conclude that her failure to leave was very much part and parcel of her life as a battered wife. The jury could conclude that instead of casting doubt on the accuracy of her testimony about the severity and frequency of prior beatings, her failure to leave actually reinforced her credibility." *Id.* at 378.

In Hawthorne v. State, 408 So. 2d 801, 806–07 (Fla. Dist. Ct. App. 1982), the court also ruled that expert testimony on the syndrome was admissible because without it "a jury would not understand why [defendant] would remain [with her husband]."

[105] *See* State v. Ciskie, 751 P.2d 1165, 1170 (Wash. 1988).

[106] In State v. Wanrow, 559 P.2d 548 (Wash. 1977), which did not involve a battered woman, the court noted that defendant was significantly smaller than the deceased and that she had a broken leg at the time of the attack. The *Wanrow* court found that defendant's response to the perceived danger was different than that of a robust person, and that it was not reasonable to expect a person in defendant's physical circumstances to defend herself without a weapon against an intoxicated, much larger attacker.

A woman's disadvantage in size may contribute to the need for and use of deadly force. Although women are socialized not to use weapons, a battered woman may learn that weapons are necessary after numerous attempts to defend herself unarmed. *See* Schneider, *supra* note 67, at 633; *see also* Catherine A. Mackinnon, *Toward Feminist Jurisprudence*, 34 STAN. L. REV 703, 732 (1982) ("Women thus perceive the need and do need to resort to deadly force, [and] are more threatened than a similarly situated man, largely because they are less able to care for themselves than they would be if they were trained [in self-defense] the way men are trained"); Borders v. State, 433 So. 2d 1325, 1326 (Fla. Dist. Ct. App. 1983) (defendant's husband said, "I see that knife. I ain't scared of that knife. You don't have as much strength as me").

[107] 478 A.2d 364 (N.J. Ct. App. 1984).

[108] *Id.* at 369.

[109] *Id.*

[110] *Id.*

Moments later, Mr. Kelly came running toward Mrs. Kelly with his hands raised.[111] Mrs. Kelly, afraid that her husband might have armed himself in the meantime, pulled a pair of scissors from her purse and stabbed him.[112]

Expert testimony on the syndrome was offered to explain the reasonableness of Mrs. Kelly's belief in imminent danger, as well as why she did not leave her abusive environment.[113] A juror unfamiliar with the syndrome might assume that the defendant was free to leave her husband at any time and that the defendant used excessive force when she wielded scissors to fend off her husband, since he apparently had no weapon at the time he ran at her. An expert on the syndrome could point out that defendant's husband had just tried to strangle her in public. After years of experiencing his beatings, Mrs. Kelly may have felt that the abuse had escalated to the point that her husband would truly kill her this time. Her past experience with him would have led her to reasonably believe that without a weapon, she would be no match for him.

While courts have become very receptive to the admission of expert testimony on the syndrome in traditional, confrontational self-defense cases like *Kelly*, this testimony is even more valuable to the defendant, yet less frequently admitted, in nontraditional self-defense cases. It is the imminence requirement that poses the problem in these cases.[114] In *State v. Allery*,[115] for example, Mrs. Allery had again been severely abused for years by her husband.[116] After five years of marriage, she got a temporary restraining order against her husband and initiated divorce proceedings.[117] One night, she came home to find her husband lying on the couch in the living room, despite the restraining order in effect.[118] She testified that he said to her, "'I guess I'm just going to have to kill you sonofabitch. Did you hear me that time?'"[119] Mrs. Allery fled

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111 *Id.*

112 *Id.* Of course, this is the defendant's version of the facts. On their face, these facts would seem capable of supporting a traditional self-defense claim. The State, on the other hand, intended to show that it was the defendant who started the scuffle, that it was Mrs. Kelly who was pulled off Mr. Kelly by bystanders, that she said she would kill him and chased after him, and, upon catching up with him, stabbed him with the scissors. *Id.* at 369 n.1.

113 *Id.* at 377.

114 *See, e.g.*, State v. Hundley, 693 P.2d 475 (Kan. 1985) (conviction reversed when jury instructed as to "immediate" danger rather than "imminent").

115 682 P.2d 312 (Wash. 1984).

116 Defendant had been subjected to many beatings, including periodic pistol whippings and assaults with knives. *Allery*, 682 P.2d at 312–13. She was once hospitalized after her husband hit her in the head with a tire iron. *Id.*

117 *Id.*

118 *Id.*

119 *Id.*

to a bedroom and tried unsuccessfully to escape through a window.[120] She heard a noise from the kitchen and thought her husband was getting a knife.[121] She took a shotgun from the bedroom and went to the kitchen, from which she shot her husband as he lay on the couch.[122]

Mrs. Allery offered expert testimony on the syndrome to inform the jury of the mentality and behavior of battered women, to demonstrate how she could have perceived herself to be in imminent danger at the time of the shooting, and to explain why she had remained for so long in the abusive relationship.[123] The trial court excluded the testimony.[124] On review, however, the court of appeals found that the testimony "explaining why a person suffering from the battered woman syndrome would not leave her mate, would not inform police or friends, and would fear increased aggression against herself would be helpful to a jury in understanding a phenomenon not within the competence of an ordinary lay person."[125] An objective, uninformed view of the facts shows that the victim was unarmed and making no attempt to harm the defendant at the time she shot him. In the context of their abusive relationship, however, the defendant had already been hospitalized once after a brutal beating and had been assaulted so often that she knew her husband would not hesitate to do so again. Furthermore, she had finally taken steps to end the abusive relationship, and feared that this might be enough provocation for him to finally kill her. Under the circumstances, the danger could clearly appear imminent to defendant, and the court ultimately found that expert testimony was necessary to explain why [126]

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[120] *Id.*

[121] *Id.* at 313–14.

[122] *Id.* at 314.

[123] *Id.* at 315.

[124] *Id.* at 313.

[125] *Id.* at 316 (citation omitted).

[126] *Id.* The *Allery* court apparently believed that, as one commentator has put it, a "very narrow view of reasonableness [of a battered woman's fear of imminent death] defeats a potentially valid claim of self-defense." Mather, *supra* note 6, at 571.

The concept of imminency has been broadened in contexts other than that of battered women, of course. In People v. Garcia, 126 Cal. Rptr. 275 (Cal. Ct. App. 1975), *cert. denied*, 426 U.S. 911 (1976), for example, Inez Garcia was raped and beaten by two men. The attackers threatened to return and rape her again. Garcia went to get a gun from her home and followed her attackers, fatally shooting one of them. The jury was allowed to hear testimony of the rape and the rapists' threat to return. The jury found that Garcia had acted in self-defense based on the rapists' threat, rather than out of vengeance for the already-perpetrated rape. Garcia was acquitted.

One commentator has gone so far as to suggest that a standard of self-defense should be adopted that does not have an imminency requirement. *See* Sarah Baseden Vandenbraak, Note, *Limits on the Use of Defensive Force to Prevent Intramarital Assaults*, 10 RUT.-CAM. L.J. 643, 651–53 (1979). Another believes that it would be preferable to expand the definition of voluntary manslaughter to include battered woman cases (when the woman

While the *Allery* court determined that the expert testimony on the syndrome should have been admitted to show why Mrs. Allery believed that she was in imminent danger, even though her husband lay prone in the other room, many other courts have barred testimony under similar circumstances. In *People v. Aris*,[127] for example, the trial court excluded expert testimony on the battered woman syndrome which was offered by the defendant to prove certain elements of self-defense. Many defense witnesses testified that Mr. Aris had beaten his wife repeatedly during their ten year marriage.[128] Mrs. Aris testified that, on the night of the killing, her husband beat her and threatened that "'he didn't think he was going to let [her] live till the morning.'"[129] Ten minutes after he fell asleep, Mrs. Aris went next door to get some ice to ease the pain of the blows she had sustained to her face.[130] While she was there, she found a handgun on the top of the refrigerator and took it back to her home with her.[131] When she returned to the bedroom, Mrs. Aris allegedly thought to herself that she "'had to do it'" because she "felt when he woke up that he was then going to hurt [her] very badly or even kill [her]."[132] She then shot her husband five times in the back while he was asleep.[133]

The California Court of Appeals affirmed the judgment of second-degree murder entered by the trial court, holding that while it was error to exclude the testimony on the issue of defendant's actual, subjective perception that she was in danger, the error was harmless beyond a reasonable doubt.[134] Moreover, the court held that the testimony was irrelevant and inadmissible on the issue of the objective reasonableness of the defendant's actions.[135] The testimony was only relevant, the court reasoned, to the defendant's subjective state of mind at the time of the offense.[136]

Courts that exclude expert testimony on the syndrome fear that admission of the evidence will send the wrong message to defendants and juries.[137] These

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establishes she is a victim of the syndrome), rather than broaden the concept of imminency. *See* Shad, *supra* note 15, at 1160.

127 264 Cal. Rptr. 167 (Cal. Ct. App. 1989).

128 *Id.* at 171.

129 *Id.*

130 *Id.*

131 *Id.*

132 *Id.*

133 *Id.*

134 *Id.*

135 In this latter respect, the court noted that its decision was contrary to at least two other decisions holding that testimony on the syndrome *is* relevant to the issue of whether the defendant acted in an objectively reasonable manner. *Id.* at 180 n.5

136 *Id.*

137 In some "nontraditional" cases, of course, the defendant's claim of imminence will appear quite specious. *See, e.g.*, Boyd v. State, 581 A.2d 1 (Md. 1990) (defendant paid $1800 to dynamite her husband's car); State v. Martin, 666 S.W.2d 895, 897 (Mo. Ct. App. 1984) (defendant hired hit man to kill her estranged husband); State v. Dannels, 734

courts are concerned that any liberality in the rules for admitting evidence on the question of self-defense may bring about an erosion of the imminence requirement and thereby excuse conduct that in the past has been deemed a crime.[138] They also worry that evidence related to the victim's bad character may sidetrack the jury from its task of determining whether the defendant committed the charged offense into an unfocused just-desserts analysis.[139]

These concerns, however, often overshadow some of the important and legitimate benefits of the testimony in nontraditional cases. If the underlying facts in the case reveal that the defendant shot her husband as he ran at her with a knife, shouting "I'm going to kill you," testimony on the syndrome may be unnecessary because the underlying facts reveal why the defendant perceived herself to be in imminent harm. The testimony may be vital to the defense, however, if the husband exhibited no outward signs of hostility at the time of the offense. In this latter instance, syndrome evidence fills a gap left by the underlying evidence. Specifically, it helps explain what is difficult for a factfinder unfamiliar with the theory to understand: that the defendant reasonably believed herself to be in imminent danger of death or great bodily

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P.2d 188, 191–92 (Mont. 1987) (defendant hired two men to asphyxiate her husband during a faked burglary of their motel room).

[138] *See, e.g., Ans*, 264 Cal. Rptr. at 173 (imminent peril must appear to defendant to be immediate and present and not merely prospective; sleeping husband cannot be imminent danger); State v. Norman, 378 S.E.2d 8, 13–16 (N.C. 1989) (court feared that when victim was asleep at time of shooting, self-defense instruction would "expand our law of self-defense beyond the limits of immediacy and necessity").

[139] *See Norman*, 378 S.E.2d at 13–16; State v. Leidholm, 334 N.W.2d 811, 820 (N.D. 1983); State v. Kelly, 478 A.2d 364, 377 (N.J. 1984); Taylor v. Dawson, 888 F.2d 1124, 1131 (6th Cir. 1989) (testimony regarding threats and acts of violence by the victim "tends to unfairly prejudice the prosecution by getting the idea across to the jury that the deceased deserved to be killed"). State v. Jahnke, 682 P.2d 991, 997 (Wyo. 1984) ("Although many people, and the public media, seem to be prepared to espouse the notion that a victim of abuse is entitled to kill the abuser that they had special justification defense is antithetical [sic] to the mores of modern civilized society"); Pierini v. State, 804 S.W.2d 258 (Tex. App. 1991); Buhrle v. State, 627 P.2d 1374 (Wyo. 1981); State v. Dannels, 734 P.2d 188 (Mont. 1987); Pugh v. State, 401 S.E.2d 270, 272 (Ga. 1991) ("while evidence of battered woman syndrome may be presented to the jury in an appropriate case, it is not a separate defense but is part of the defense of justification").

Professor Holly Maguigan has also theorized that judges may resist letting in evidence of the syndrome because they think battered women are claiming a special license to murder rather than asserting a valid claim of self-defense. *See* Sargeant, *supra* note 16, at 17.

Commentators, too, sometimes refer to the battered woman syndrome as a defense unto itself rather than an aid to fit a female defendant into the traditional concept of self-defense. *See, e.g.*, Rosen, *supra* note 6, at 14–15; Elizabeth Vaughn & Maureen L. Moore, *The Battered Spouse Defense in Kentucky*, 10 N. KY. L. REV 399, 399 (1983) (battered woman defense is emerging as "akin to, but separate from, the more familiar and established defenses of self-defense and diminished capacity").

harm, and unable to escape from her situation, even though the batterer appeared to be passive at the time of the offense. Without this testimony, the factfinder is left to draw his or her own inferences from the underlying facts. These inferences are likely to be skewed, however, because lay persons generally labor under misconceptions about battered women.

III. THE CONSTITUTIONAL IMPLICATIONS OF EXCLUDING SYNDROME EVIDENCE IN A CRIMINAL TRIAL

In the day-to-day application of the rules of evidence, a separate consideration of constitutional rights is unnecessary The Constitution does not incorporate the Federal Rules of Evidence; the exclusion of even relevant and probative evidence, therefore, generally does not implicate constitutional rights.[140]

The proposed exclusion of evidence which is particularly reliable and crucial to the defense, however, should serve "as a warning flag to trial judges to weigh the fairness of their decision."[141] In all criminal trials the accused has the right to present a defense.[142] This right has long been recognized as fundamental and essential to due process.[143] It is also protected by the

[140] *See, e.g.*, Fennell v. Goolsby, 630 F Supp. 451, 458 (E.D. Pa. 1985) (trial court erroneously excluded expert testimony on battered woman syndrome because expert had not personally interviewed defendant, but exclusion did not violate the Constitution because evidence was not critical to the defense and exclusion was harmless error).

[141] Perry v. Rushen, 713 F.2d 1447, 1453 (9th Cir. 1983).

[142] *See* Michigan v. Lucas, 111 S. Ct. 1743 (1991); Taylor v. Illinois, 484 U.S. 400 (1988); Chambers v. Mississippi, 410 U.S. 284, 298 (1973); Cool v. United States, 409 U.S. 100, 104 (1972) (per curiam); Webb v. Texas, 409 U.S. 95, 98 (1972) (per curiam); Washington v. Texas, 388 U.S. 14, 19 (1967). *See generally* WAYNE R. LAFAVE & JEROLD H. ISRAEL, 3 CRIMINAL PROCEDURE § 23.3(f) (1984); Annotation, *Accused's Right, Under Federal Constitutional Sixth Amendment, To Compulsory Process for Obtaining Witnesses in Accused's Favor—Supreme Court Cases*, 98 L. ED. 2d 1074 (1988); Robert N. Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV 713 (1976); Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV 71 (1974) [hereinafter "Westen, *Compulsory Process*"]; Peter Westen, *Compulsory Process II*, 74 MICH. L. REV 193 (1975) [hereinafter "Westen, *Compulsory Process II*"].

[143] *See Chambers*, 410 U.S. at 294 (exclusion of testimony that bore persuasive assurances of trustworthiness violated defendant's due process right to present witnesses in his own defense); *Webb*, 409 U.S. at 98 (judge's threatening remarks to defense witness effectively drove the witness off of the stand and deprived the defendant of due process of law under the Fourteenth Amendment); Clinton, *supra* note 142, at 747-801; *see also* Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987) (Due Process Clause guarantees the defendant's right to discover the identity of government witnesses).

Compulsory Process Clause of the Sixth Amendment[144] because the right to compel the appearance of witnesses has meaning only if it includes the right to present the testimony of these witnesses.[145]

While the Supreme Court has never ruled on the issue, it appears from other cases that this constitutional right to present a defense includes a right to present expert testimony to establish a defense, subject to the same restrictions outlined above. In *People v. Watson*,[146] the Illinois Supreme Court held that when expert testimony is deemed by the trial judge to be "crucial to a proper defense," the accused has not only a right to present the testimony of the expert, but also the right to public funds in order to secure the assistance of that expert, if necessary.[147] Similarly, in *State v. Sims*,[148] an Ohio Court of Appeals found that if a polygraph examiner "is able to reach a conclusion which favors defendant's view of the issues, [the defendant has the right to] compulsory process for his testimony as a witness."[149] Professor Peter Westen agrees that "it is scarcely conceivable that defendants could be constitutionally denied the opportunity to call experts to give opinion evidence about such

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[144] The Compulsory Process Clause of the Sixth Amendment reads as follows: "In all criminal prosecutions, the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor." U.S. CONST. amend. VI.

The extensive history of the Compulsory Process Clause is beyond the scope of this Article. A reader who is interested in reading about this should consult Professor Westen's seminal works on the subject. *See* Westen, *Compulsory Process*, *supra* note 142; Westen, *Compulsory Process II*, *supra* note 142; Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV L. REV 56, 171 (1978).

[145] *See Lucas*, 111 S. Ct. at 1747; *Taylor*, 484 U.S. at 409; *Washington*, 388 U.S. at 19.

The relationship between the Due Process and Compulsory Process Clauses is not clear. *See Ritchie*, 480 U.S. at 55-56. For many years, the Supreme Court variously ascribed the right to present a defense either to the Due Process Clause or the Compulsory Process Clause without much explanation of its choice. *Compare, e.g., Washington*, 388 U.S. at 19 (Compulsory Process Clause) *and Cool*, 409 U.S. at 104 (Compulsory Process Clause) *with Chambers*, 410 U.S. at 294 (Due Process Clause) *and Webb*, 409 U.S. at 98 (Due Process Clause). Today, however, it is fairly clear that the Court views a criminal defendant as having a single right to present a defense, with two constitutional sources: the Due Process Clause and the Compulsory Process Clause. *See Taylor*, 484 U.S. at 409. While the substantive differences between the Due Process and Compulsory Process Clauses may be important when another right is at stake, *see, e.g., Ritchie*, 480 U.S. at 55-56, the differences do not appear to be important in this context.

[146] 221 N.E.2d 645 (Ill. 1966).

[147] *Id.*; *see also* United States v. Nixon, 418 U.S. 683, 711 (1974) (Sixth Amendment protects defendant's right to the production of "all evidence" at a criminal trial); People v. Nichols, 388 N.E.2d 984 (Ill. 1979); People v. Vines, 358 N.E.2d 72 (Ill. Ct. App. 1976); People v. Glover, 273 N.E.2d 367 (Ill. 1971).

[148] 369 N.E.2d 24 (Ohio Ct. App. 1977).

[149] *Id.* at 31.

matters as fingerprints, bloodstains, sanity, and other matters that routinely arise in criminal litigation."[150]

Under some circumstances, the exclusion of expert testimony on the battered woman syndrome implicates this constitutional right.[151] For instance, when the defendant offers expert testimony on the syndrome to prove that she acted in self-defense in a murder or assault case she is, in effect, asserting this right.[152] If the trial court excludes the testimony, the exclusion may raise constitutional as well as evidentiary concerns.[153]

Whether the exclusion violates the defendant's constitutional right depends, however, not only upon the importance of the testimony to the defense but also upon the state's countervailing interest in excluding the evidence. The right to present a defense is not absolute.[154] As the Supreme Court has explained, the Sixth Amendment "'does not confer the right to present testimony free from the legitimate demands of the adversarial system.'"[155] The accused, like the

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[150] Westen, *Compulsory Process II*, *supra* note 142, at 203.

[151] *See infra* sections IIIA–C.

[152] In State v. Kelly, 478 A.2d 364, 376 (N.J. 1984), for instance, the court recognized that expert testimony on the syndrome "protects due process rights by allowing [the accused] to offer testimony to establish a defense." The testimony "is aimed at an area where the purported common knowledge of the jury may be very much mistaken, an area where jurors' logic, drawn from their own experience, may lead to a wholly incorrect conclusion, an area where expert knowledge would enable the jurors to disregard their prior conclusions as being common myths rather than common knowledge." *Id.* at 378.

[153] *See, e.g.*, *id.* at 376 n.11; Fennell v. Goolsby, 630 F Supp. 451, 460–62 (E.D. Pa. 1985); Tourlakis v. Morris, 738 F. Supp. 1128, 1134–40 (S.D. Ohio 1990).

Expert testimony on the battered woman syndrome is so important in some trials that a failure to raise it as an issue when it is clearly applicable may constitute ineffective assistance of counsel. See Commonwealth v. McFadden, 587 A.2d 740 (Pa. 1991); State v. Wickline, 399 S.E.2d 42 (W Va. 1990) (court considered, but declined to rule on ineffective assistance claim); State v. Reneau, 804 P.2d 408 (N.M. 1990) (same).

[154] *See Chambers*, 410 U.S. at 295 (defendant's right to present testimony "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process"); United States v. Nobles, 422 U.S. 225, 241 (1975); Rock v. Arkansas, 483 U.S. 44, 55 (1987).

[155] *Nobles*, 422 U.S. at 241. In *Washington v. Texas*, the Court reserved the issue of whether a witness's valid assertion of a testimonial privilege could override the defendant's right to present that witness's testimony in his defense. *See* Washington v. Texas, 388 U.S. 14, 23 n.21.

Some courts have filled the vacuum left by *Washington*, holding that the state may exclude testimony that is both favorable and material to the defense when the defense witness asserts a valid privilege. *See* United States v. Khan, 728 F.2d 676, 678 (5th Cir. 1984); Valdez v. Winans, 738 F.2d 1087, 1089 (10th Cir. 1984); United States v. Moreno, 536 F.2d 1042, 1046 (5th Cir. 1976); Wisconsin ex. rel. Monsoor v. Gagnon, 497 F.2d 1126, 1129 (7th Cir. 1974); United States v. Lyon, 397 F.2d 505, 512 (7th Cir. 1968). *See also* United States v. Chagra, 669 F.2d 241, 260 (5th Cir. 1982) (witness's valid claim of

State, "must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence."[156]

There are few guidelines for determining when the defendant's right to present a defense must bow to the state's interest in its rules of evidence or procedure.[157] In what follows, we examine some guidelines that do exist and then consider whether, and if so how, these guidelines apply in cases in which syndrome evidence has been excluded.

A. *"Favorable" and "Material" Testimony*

To establish a violation of the right to present a defense, a criminal defendant must show at a minimum that the excluded testimony would have been both "favorable" and "material" to her defense.[158]

The requirement that the testimony be "favorable" to the defense will rarely be an obstacle.[159] While it is conceivable that, in a given case, an expert on the syndrome may give unfavorable or unhelpful testimony for the

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immunity may be sufficient to overcome the defendant's interest in presenting witnesses to establish a defense).

"[T]he Supreme Court [, however,] has never permitted a privilege to be asserted in such a manner as to deny the defendant material evidence in his favor." Westen, *Compulsory Process II*, *supra* note 142, at 229. In fact, the Supreme Court has suggested that in direct conflicts between the privileges of witnesses and the rights of the accused, the rights of the accused are "paramount." Davis v. Alaska, 415 U.S. 308, 319 (1974) (defendant's right to confront witnesses against him overcame state's interest in preserving anonymity of juvenile offender). *See also* United States v. Nixon, 418 U.S. 683, 709 (1974) (executive privilege yields to need for criminal evidence). *See generally* Robert Weisburg, Note, *Defendant v. Witness: Measuring Confrontation and Compulsory Process Rights Against Statutory Communications Privileges*, 30 STAN. L. REV 935 (1978).

[156] *Chambers*, 401 U.S. at 302.

[157] For a broader discussion of these guidelines, including a discussion of some that are not directly relevant to this article, see Westen, *Compulsory Process II*, *supra* note 142, at 194–234.

[158] *See Washington*, 388 U.S. at 16; United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982) (defendant could not establish violation of his constitutional right to compulsory process merely by showing that deportation of witnesses deprived him of their testimony; he must "at least make some plausible showing of how their testimony would have been both material and favorable to his defense"); Davis v. Jabe, 824 F.2d 483, 486–87 (6th Cir. 1987) (trial court's decision to exclude testimony by defendant's brother was an evidentiary error, but testimony was not "vital" or "critical" to the defense); Westen, *Compulsory Process II*, *supra* note 142, at 213–31. *But see* United States v. Burr, 25 F. Cas. 30 (C.C.D. Va. 1807) (Marshall, Cir. J.) (it would be unreasonable to require the defendant, Aaron Burr, to show the relevance of missing testimony).

[159] In other contexts, however, this requirement is very much an obstacle for the defendant. *See* LaFave & Israel, *supra* note 142, at § 23.3(f) at 20 (discussing aftermath of Chambers v. Mississippi, 410 U.S. 284 (1973)).

defendant, the burden on the defendant to demonstrate that the testimony will be favorable is "a very slight one."[160] The defendant need only show that the testimony would be "potentially useful" to her case.[161]

The "materiality" requirement presents a greater obstacle to the defendant. "Material" testimony is that which is so important and critical to the defense that its exclusion would amount to prejudicial error.[162] If one can conclude that the testimony could have affected the judgment of the jury, it is "material."[163] Evidence that is merely duplicative or of only tangential importance is not "material" to the defense.[164]

The seminal case of *Washington v. Texas*[165] illustrates the type of testimony that may be "favorable" and "material" to the defense. In *Washington*, the petitioner Jackie Washington sought to call as a witness at his murder trial one Charles Fuller, who had already been convicted of the same crime.[166] Washington wanted to show that Fuller shot the victim and that he, Washington, had attempted to prevent the shooting.[167] The prosecution, however, successfully objected to Washington's offer of Fuller's testimony under an arcane Texas rule of testimonial competence. The rule forbade the defendant from calling as witnesses those persons charged as principals, accomplices, or accessories in the same crime.[168] The asserted purpose of the

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[160] Evans v. Janing, 489 F.2d 470, 476 (8th Cir. 1973).

[161] *Id.* at. 476. *See also Valenzuela-Bernal*, 458 U.S. at 867 (defendant "must at least make *some plausible showing* of how [witness's] testimony would have been both material and favorable to his defense.") (emphasis added).

For a more extensive discussion of the requirement that the testimony be in the defendant's favor, see Westen, *Compulsory Process II*, *supra* note 142, at 231–34.

[162] *See Valenzuela-Bernal*, 458 U.S. at 868–70. The concept of "materiality" is not a new one; it has long been part of due process analysis. *See, e.g.*, Brady v. Maryland, 373 U.S. 83 (1963) (suppression of evidence favorable to the accused violates due process when that evidence is "material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."); Moore v. Illinois, 408 U.S. 786, 794 (1972) (defendant will prevail on *Brady* claim "where the evidence is favorable to the accused and is material either to guilt or to punishment"); United States v. Agurs, 427 U.S. 97, 112–13 (1976) ("omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.").

[163] *See* Giglio v. United States, 405 U.S. 150, 154 (1972) (citing Napue v. Illinois, 360 U.S. 264, 269 (1959)).

[164] *See, e.g.*, *Valenzuela-Bernal*, 458 U.S. at 871 (defendant failed to show that testimony of deported witnesses would have been favorable and material to his defense).

[165] 388 U.S. 14 (1967).

[166] *Id.* at 16.

[167] *Id.*

[168] *Id.* at 17.

rule was to prevent perjury.[169] The Supreme Court reversed Washington's conviction, holding that the state rule violated the accused's Sixth Amendment right to compulsory process.[170]

The Court identified at least two reasons why the testimony was favorable and material to Washington's defense. First, the witness had a unique perspective on the events giving rise to the criminal charge. Fuller was "physically and mentally capable of testifying to events that he had personally observed."[171] Second, the witness's testimony was not only relevant, it was potentially exculpatory.[172] If believed, Fuller's testimony would have absolved Washington of responsibility for the crime.

These reasons apply with some force in the context of the battered woman syndrome.[173] Certainly, there is a factual difference between eyewitness testimony of a coparticipant in a crime, such as that at issue in *Washington*, and expert testimony on the syndrome. Nevertheless, these types of testimony are similar in their purposes and effects. Both the coparticipant and the expert offer an insight on the defendant's actions at the time of the offense. One perspective is based upon personal experience and the other is based upon professional analysis and experience. The expert informs the factfinder about how the battered woman's perception of her position vis-a-vis the batterer is shaped by her experience with abuse. Such testimony may be crucial to fulfilling the requirements of self-defense under state law.[174]

Case law suggests that syndrome testimony may be favorable and material to the defense even when it is used for purposes other than bolstering a self-defense claim. In *People v. Minnis*,[175] a state trial court excluded expert testimony on the syndrome when it was offered to explain the defendant's

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[169] *Id.* at 16.

[170] *Id.* at 23.

[171] *Id.*

[172] *Id.*

[173] *See, e.g.*, State v. Kelly, 478 A.2d 364, 376 (N.J. 1984) (excluded expert testimony on battered woman syndrome was "central to the defendant's claim of self-defense, [and] its exclusion, if otherwise admissible, [could not] be held to be harmless error").

[174] *See, e.g.*, *Kelly*, 478 A.2d at 376 (because testimony on battered woman syndrome "was central to the defendant's claim of self-defense, its exclusion, if otherwise admissible, cannot be held to be harmless error"); State v. Koss, 551 N.E.2d 970, 974 (Ohio 1990) (when expert testimony is offered to support a theory of self-defense, "the 'testimony [is] *essential* to rebut the general misconceptions regarding battered women.") (quoting WALKER, THE BATTERED WOMAN, *supra* note 19) (emphasis added).

See Fennell v. Goolsby, 630 F Supp. 451, 460–61 (E.D. Pa. 1985). *But see Kelly*, 478 A.2d at 375 (credibility of defendant was a "critical issue" in the case). It is axiomatic that evidence which is merely cumulative also is not "material." *See* Fielder v. State, 756 S.W.2d 309, 320 (Tex. Ct. App. 1988).

[175] 455 N.E.2d 209 (Ill. Ct. App. 1983).

conduct after the victim's death.[176] Before trial, the defendant filed a motion in limine to exclude evidence that she had killed and then dismembered her husband.[177] The state successfully argued, however, that the evidence was relevant to the defendant's consciousness of guilt and should be admitted.[178] To counter the effect of this evidence at trial, the defendant offered to introduce expert testimony on the battered woman syndrome.[179] The expert was prepared to testify that the defendant's decision to dismember the body was influenced by her emotional reaction to the shock of the situation, including the abuse which she claimed to have suffered at the hands of her husband.[180] The trial court ruled that the testimony was irrelevant, however, and excluded it.[181] The defendant was convicted of murder and sentenced to twenty-five years in jail.[182]

The Illinois Court of Appeals reversed the conviction, holding that the exclusion of the expert testimony on the syndrome deprived the defendant of her constitutional right to present a defense.[183] The Court concluded that the state's use of the dismemberment evidence to prove defendant's consciousness of guilt made it necessary for the defendant to offer an explanation consistent with her theory of innocence.[184] To this end, the "defendant had a right to present evidence relevant to her explanation of her conduct, no matter how far-fetched it might appear to the average individual."[185]

Thus, expert testimony on the syndrome may be favorable and material to the defense in various types of cases. When the testimony is offered to bolster a claim of self-defense, it is often the centerpiece of the defense effort. Even when offered simply to support a theory that is consistent with a belief in innocence, however, the testimony may be vital to the defense.

B. *Balancing the Interests of the State and the Accused*

1. *The Meaning of "Arbitrary"*

Even if the accused offers testimony that is favorable and material to the defense, its exclusion does not violate the Constitution unless it renders the trial

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176 *See id.* at 215.
177 *Id.* at 211.
178 *Id.* at 215.
179 *Id.*
180 *Id.*
181 *Id.*
182 *Id.* at 211.
183 *Id.* at 217.
184 *Id.* at 217–18.
185 *Id.* at 218.

"arbitrary" or "fundamentally unfair."[186] While the rules of evidence may not be "applied mechanistically to defeat the ends of justice,"[187] the Constitution does not guarantee compliance with those rules. Even a clearly erroneous evidentiary ruling does not violate the defendant's right to present a defense unless it can be said to have rendered the trial "arbitrary" or "fundamentally unfair."[188]

The meaning of the term "arbitrary," as applied to evidentiary rules, has evolved somewhat over the years. In *Washington*, the Supreme Court concluded that the state rule of testimonial competence at issue violated the accused's right to compulsory process because it "arbitrarily" denied him the right to put his witness on the stand to establish a defense.[189] This rule was unlike "nonarbitrary state rules that disqualify as witnesses persons who, because of mental infirmity or infancy, are incapable of observing events or testifying about them."[190] The difference is that "arbitrary" rules "prevent whole categories of defense witnesses from testifying on the basis of a priori categories that presume them unworthy of belief,"[191] without allowing for individualized examination.

Unfortunately, this distinction between "arbitrary" and "nonarbitrary" rules of testimonial competence in *Washington* does not provide much assistance in other types of cases. It does not, for instance, provide a method for determining when rules excluding irrelevant, prejudicial, or hearsay evidence, may have the effect of arbitrarily excluding testimony that is vital and material to the defense.

The more recent case of *Rock v. Arkansas*[192] provides a broader analytical framework for determining what is an "arbitrary" rule or ruling. In *Rock*, the accused was charged with manslaughter of her husband. Because she could not remember the details of the shooting, she was hypnotized by a neuropsychologist to refresh her memory [193] After hypnosis, she was able to remember that at the time of the shooting, she had not held her finger on the trigger of the gun and that the gun had discharged when her husband grabbed her arm during a fight.[194] At trial, however, the court limited her testimony to

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[186] *See* Pennywell v. Rushen, 705 F.2d 355, 357 (9th Cir. 1983); *see also* Washington v. Texas, 388 U.S. 14, 23 (1967).

[187] Chambers v. Mississippi, 410 U.S. 284, 302 (1973).

[188] *See* Estelle v. McGuire, 112 S. Ct. 475, 482 (1991); Marshall v. Lonberger, 459 U.S. 422, 438 n.6 (1983); *Washington*, 388 U.S. at 23; *Chambers*, 410 U.S. at 302.

[189] *Washington*, 388 U.S. at 23.

[190] *Id.* at 23 n.21.

[191] *Id.* at 22. *See also* Westen, *Compulsory Process II*, *supra* note 142, at 201-02.

[192] 483 U.S. 44 (1987).

[193] *Id.* at 47.

[194] *Id.*

matters remembered before hypnosis and the jury convicted her of manslaughter.[195]

The Supreme Court reversed her conviction, finding that the limitations placed on her testimony violated her constitutional right to testify on her own behalf.[196] In so doing, the Court observed that "[j]ust as a State may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand [*see Washington*], it also may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony."[197] The key is that "restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed upon the defendant's constitutional right to testify."[198]

This passage from *Rock* suggests that to determine whether a rule is "arbitrary," the interests of the state and the accused must be weighed against one another.[199] When these competing interests are involved, it is not enough for a court to simply examine the rule to determine in the abstract whether it is "arbitrary."[200] The court must determine whether the "interests served by a rule justify the limitation imposed upon the defendant's constitutional right to testify."[201] If the harmful effects of the state rule on the defendant's interest in presenting the testimony are "disproportionate" to the purposes the rule is designed to serve, the rule is unconstitutional.[202]

While *Rock* is the first case to tie the "arbitrariness" language in *Washington* to a balancing approach, the Court employed the approach in

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[195] *Id.*

[196] *Id.* at 62.

[197] *Id.* at 55.

[198] *Id.* at 55-56. The fact that *Rock* involved the constitutional right to testify rather than the right to present witnesses should not make a difference in this analysis. The right to testify is merely the right of the defendant to testify as a witness in her own defense. This right is protected by the Compulsory Process Clause, the Due Process Clause, and the Fifth Amendment privilege against self-incrimination.

[199] At least three federal circuits employ a balancing approach to resolve conflicts between the defendant's right to present testimony to establish a defense and the state's interest in its rules of evidence and procedure. *See* Perry v. Rushen, 713 F.2d 1447, 1450 (9th Cir. 1983); Pettijohn v. Hall, 599 F.2d 476, 481 (1st Cir.), *cert. denied*, 444 U.S. 946 (1979); McMorris v. Israel, 643 F.2d 458, 461 (7th Cir. 1981), *cert. denied*, 445 U.S. 967 (1982); Alicea v. Gagnon, 675 F.2d 913, 923 (7th Cir. 1982).

[200] *See infra* Part IIIB-3.

[201] Rock v. Arkansas, 483 U.S. 44, 56 (1987). The Court recently reaffirmed the "arbitrary or disproportionate" test in Michigan v. Lucas, 111 S. Ct. 1743 (1991) (Michigan rape shield law did not violate defendant's Sixth Amendment right to present testimony because it was not arbitrary or disproportionate to the purposes it was designed to serve).

[202] *See Rock*, 483 U.S. at 55.

earlier cases without explicitly indicating that it was doing so. In *Chambers v. Mississippi*,[203] for instance, the defendant tried to introduce evidence that another person had confessed to the crime with which he had been charged.[204] This testimony clearly was crucial to the defense, but the trial court excluded it as hearsay.[205] In reviewing the exclusion of the testimony, the Supreme Court initially recognized that the accused's right to present witnesses to establish a defense is fundamental.[206] While the accused may not offer evidence free from the constraints of the adversarial system,[207] the exclusion of the testimony in this case violated the defendant's fundamental right. The defendant's interest in presenting the testimony was compelling, because it was favorable and material to his defense, while the state's interest in excluding the same was weak, because even though the testimony was hearsay, it bore assurances of trustworthiness: the statement sought to be admitted would have gone against the declarant's penal interest.[208]

A more recent example of this balancing approach in operation is *Crane v. Kentucky*.[209] In *Crane*, the defendant offered to introduce witness testimony that his out-of-court confession was not credible because he allegedly had been forced to give it during an intense interrogation process.[210] The trial court excluded the testimony, holding that it was only relevant to the issue of whether the confession had been voluntary—a question which the trial court had already ruled upon.[211] The Supreme Court reversed, holding that the circumstances surrounding the taking of a confession are "highly relevant" to the factual determination of the defendant's guilt or innocence.[212] The lower court's ruling deprived the defendant "of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'"[213] Thus, the testimony should have been admitted because it was "highly relevant" to an issue that bore upon the defendant's guilt or innocence

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[203] 410 U.S. 284, 298.

[204] As LaFave and Israel note, *Chambers* is an uncertain precedent because the Court did not decide in that case whether the error of excluding the defense witness testimony, standing alone, violated the defendant's due process rights. *See* LAFAVE & ISRAEL, *supra* note 142, at § 23.3(f) at 20.

[205] *See Chambers*, 410 U.S. at 294.

[206] *Id.* at 302. *See also Rushen*, 713 F.2d at 1450; United States v. Garner, 581 F.2d 481, 488 (5th Cir. 1978); United States v. Thomas, 488 F.2d 334, 335 (6th Cir. 1973).

[207] *See Chambers*, 410 U.S. at 302.

[208] *See* FED. R. EVID. 804(b)(3).

[209] 476 U.S. 683 (1986).

[210] *Id.* at 685.

[211] *Id.* at 686.

[212] *Id.* at 691.

[213] *Id.* at 690–91 (quoting United States v. Cronic, 466 U.S. 648, 656 (1984)).

and the state's interest in excluding it was weak, since its exclusionary rule was grounded on an erroneous understanding that the testimony was irrelevant.[214]

While cases applying the balancing approach are instructive here, they do not make it simple to determine when the restrictions placed on the defendant's right to present testimony are disproportionate to the purposes those restrictions are designed to serve. Some have suggested that the best way to resolve the competing interests is through a compelling or legitimate state interest test.[215] This test would place the burden on the state to show that its rule excluding defense witness testimony advanced a compelling or legitimate state interest in order to pass constitutional muster.[216]

The Supreme Court has never explicitly employed this test, however. It appears to use a case-by-case balancing approach in which the interests of the accused and the state vary, depending upon the strength of the defendant's interest in presenting the testimony and the purpose sought to be advanced by the rule of evidence or procedure.[217] In evaluating the significance of the excluded evidence, the court considers all of the circumstances: the probative

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[214] *Id.* at 691.

[215] *See* Pettijohn v. Hall, 599 F.2d 476, 481 (1st Cir.), *cert. denied*, 444 U.S. 946 (1979) ("[o]nce a Sixth Amendment right is implicated, the state must offer a sufficiently compelling purpose to justify the practice"); Clinton, *supra* note 142, at 798.

It appears that there may be equally good support for the idea that *defendant* must present a compelling reason to overcome the state's interest in its own trial rules and procedures. *See* Ohio v. Roberts, 448 U.S. 56 (1980) (state interest in reliable trials can prevail over defendant's right to confront witnesses, when hearsay evidence is needed and reliable); United States v. Nixon, 418 U.S. 683, 709–12 (1974) (interest in fair administration of criminal justice outweighs general executive privilege in confidential documents); Branzburg v. Hayes, 408 U.S. 665, 690 (1972) (state interest in "fair and effective law enforcement" overrides a reporter's First Amendment interest in preserving secrecy of sources); Younger v. Harris, 401 U.S. 37 (1971) (state interest in orderly criminal trial process is sufficient to prevent federal courts from enjoining most state criminal trials); Cox v. Louisiana, 379 U.S. 559, 562 (1965) (interest in protecting state's judicial system justified prohibiting of picketing near courthouse).

[216] Clinton, *supra* note 142, at 798.

[217] *See, e.g.*, Chambers v. Mississippi, 410 U.S. 284, 302 (1973); *see also* Perry v. Rushen, 713 F.2d 1447, 1450 (9th Cir. 1983) ("The Supreme Court seems to have applied a balancing test to resolve conflicts, weighing the interest of the defendant against the state interest in the evidentiary rule"); McMorris v. Israel, 643 F.2d 458, 461 (7th Cir. 1981) ("competing state interests must be substantial to overcome the claims of the defendant"); Phillips v. Wainright, 624 F.2d 585, 590 (5th Cir. 1980) (because defendant failed to show that exclusion of certain testimony by experts was "fundamentally unfair," court of appeals did not need to "engage in the process of weighing the state's interest in applying its rules governing evidentiary competency against Phillips' interest in introducing the excluded evidence); *Pettijohn*, 599 F.2d 476, 481 (1st Cir. 1979) ("[o]nce a Sixth Amendment right is implicated, the state must offer a sufficiently compelling purpose to justify the practice.").

value of the evidence on the central issue, its reliability,[218] whether it is the sole evidence on the issue or merely cumulative,[219] and whether it constitutes a major part of the attempted defense.[220] The weight of the state's interest likewise depends upon many factors. The Court must determine the purpose of the rule,[221] its importance, how well the rule implements this purpose,[222] and how well the purpose applies in the case at hand.[223] The Court gives due weight to the substantial state interests in preserving orderly trials, in judicial efficiency, and in excluding unreliable or prejudicial evidence.[224]

2. *Misapplication of the Balancing Approach in the Syndrome Context*

Thus far, only a few courts have considered whether the exclusion of expert testimony on the battered woman syndrome violates the defendant's constitutional right to present a defense.[225] The opinions on this issue are

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[218] *Chambers*, 410 U.S. at 300 (trial court denied defendant due process right to present a defense when it excluded hearsay statement against declarant's penal interest because it was "made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability."); *accord Perry*, 713 F.2d at 1453.

[219] *See* Washington v. Texas, , 388 U.S. 14, 23 (1967) (witness whose testimony was excluded "was the only person other than petitioner who knew exactly who had fired the shotgun and whether petitioner had at the last minute attempted to prevent the shooting"); *accord Perry*, 713 F.2d at 1453.

[220] *See Washington*, 388 U.S. at 23 (testimony must be "relevant and material" to the defense in order for its exclusion to run afoul of the Sixth Amendment right to present testimony to establish a defense); *Perry*, 713 F.2d at 1453.

[221] *See Washington*, 388 U.S. at 20–22 (purpose of Texas testimonial competence rule ostensibly was to prevent perjury); *Chambers*, 410 U.S. at 298 (hearsay rule "is based on experience and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact"); *accord Perry*, 713 F.2d at 1453.

[222] *See Washington*, 388 U.S. at 22–23 (state testimonial competence rule did not serve its alleged purpose because it only applied when the defendant sought to present testimony of a coparticipant in a crime and not when the prosecution attempted to present the testimony of the same witness; yet the possibility that the witness would perjure himself was at least as great when the prosecution called the witness); *accord Perry*, 713 F.2d at 1453.

[223] *See Washington*, 388 U.S. at 22.

[224] *Perry*, 713 F.2d at 1453.

[225] *See supra* note 1. The broader issue of whether the exclusion of expert testimony on any scientific subject may violate the defendant's constitutional right to present a defense has received some attention. In State v. Dorsey, 532 P.2d 912 (N.M. App. 1975), *aff'd*, 539 P.2d 204 (1975), for instance, a New Mexico Appellate Court held that the exclusion of the results of a polygraph test which tended to confirm the accused's assertion that he acted in self-defense violated the defendant's right to present a defense. The *Dorsey* court explicitly relied upon the Supreme Court's opinion in *Chambers v. Mississippi* in assessing the importance of the excluded evidence to the accused's defense and, finding the evidence critical, held that the Due Process Clause of the Fourteenth Amendment compelled the

somewhat confused because they do not, for the most part, employ the balancing approach favored by the Supreme Court. The most recent opinions, in particular, tend to give almost presumptive weight to the interest of the state and fail to distinguish adequately between evidentiary and constitutional concerns.

The recent case of *Tourlakis v. Morris*[226] demonstrates both of these problems. By all accounts presented at trial, Andrea Tourlakis and Murray Sparks had a violent and tumultuous relationship. Tourlakis testified that Sparks was an intensely jealous and violent man who once placed his razor down in a bar where Tourlakis worked and announced to her customers "you don't touch her."[227] Tourlakis also told the court that Sparks once called her into the kitchen of the bar, put his hands around her throat and threatened to kill her.[228] According to Tourlakis, Sparks also threatened her at home by holding his razor to her throat and telling her that "he was going to cut my body so no one else could look at me and he would break my legs."[229]

Tourlakis claimed that a week before the offense, Sparks "tore [her] whole body up" after an argument at her apartment.[230] After this beating, Tourlakis shot at the wall and begged Sparks to leave.[231] Tourlakis and Sparks argued every night the following week about her desire to end the relationship.[232]

On the night before the offense, Tourlakis and Sparks argued at her apartment about a man who had touched her shoulder at the bar.[233] When Sparks arrived at the apartment the next morning, he allegedly told Tourlakis that he loved her and began to move closer to her.[234] At that point, Tourlakis shot him with a gun that she had at the apartment.[235] Sparks then threw a clothes basket at her and she shot and wounded him two more times.[236] She then chased him from her home with her gun, firing repeatedly even as he entered an ambulance that happened to be nearby [237]

At her bench trial, Tourlakis presented the testimony of four bar patrons to establish that she was a battered woman and to support her theory of self-

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admission of the polygraph evidence. *But see* State v. Galloway, 187 N.W.2d 725 (Iowa 1971) (appears to reject claim analogous to that in *Dorsey*); Galloway v. Brewer, 525 F.2d 369 (8th Cir. 1975) (same).

226 738 F Supp. 1128 (S.D. Ohio 1990).

227 *Id.* at 1130.

228 *Id.*

229 *Id.*

230 *Id.*

231 *Id.* at 1131.

232 *Id.*

233 *Id.*

234 *Id.*

235 *Id.*

236 *Id.*

237 *Id.*

defense. Two of them testified that Sparks had a general reputation for violence and jealousy [238] Another testified that he had witnessed Sparks hold a knife to Tourlakis.[239] A different witness testified that Tourlakis often wore turtlenecks to cover her bruises and that the witness had been present when Sparks allegedly told Tourlakis that he was going to kill her.[240] Finally, another witness told the court that he broke up a fight at the bar when Sparks tried to choke Tourlakis.[241]

After presenting this foundation, Tourlakis attempted to offer expert testimony on the battered woman syndrome in order to support her theory of self-defense.[242] She was prevented from doing so, however, because the court had granted the state's motion in limine to exclude all evidence related to the battered woman syndrome.[243] At the end of trial, the court found Tourlakis guilty of attempted murder. Her conviction was affirmed on direct appeal.

Upon a petition for a writ of habeas corpus, a federal district court issued a lengthy opinion addressing whether Tourlakis had been denied her right to present a defense by the exclusion of expert testimony at her trial.[244] The court's reasoning is flawed in some significant respects. Instead of using the balancing approach suggested by numerous Supreme Court cases,[245] the district court examines whether the state court's evidentiary ruling is "unconstitutionally arbitrary."[246] The court acknowledges in its opinion that the "right to present a defense is unquestionably fundamental,"[247] but it does not attempt to assess the defendant's interest in presenting the testimony, nor does it attempt to balance that interest against the state's interest in exclusion.[248] Instead, the court focuses almost entirely on whether the state rule can be justified and whether it is possible to uphold the trial court's decision to exclude the testimony [249]

The court also appears to have misunderstood the purpose of the testimony. Tourlakis offered the testimony to help prove that she acted in self-defense when she shot Murray Sparks.[250] The district court, however, treats the

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238 *Id.*

239 *Id.*

240 *Id.*

241 *Id.*

242 *Id.*

243 *Id.* at 1129.

244 *Id.* at 1134–40.

245 *See supra* Part IIIB.

246 *Tourlakis*, 738 F Supp. at 1137.

247 *Id.* at 1138.

248 *See id.* at 1137–40.

249 *Id.* at 1137–40.

250 *Id.* at 1129 ("Petitioner asserted the defense of self-defense at trial, attempting to establish the victim's reputation and propensity for violence, including specific prior violent acts against petitioner . ").

testimony as having been offered to prove a substantive defense based upon the syndrome itself and not as having been offered to aid the court in determining whether Tourlakis acted in self-defense. The court's misunderstanding is evident from statements asserting that the trial court was not bound to accept "a defense based upon such expert testimony "[251]

The *Tourlakis* court also confuses the constitutional issue with evidentiary concerns.[252] In its discussion of whether the trial court violated the defendant's constitutional right to present a defense, the district court twice notes that "'[s]cientific evidence impresses lay jurors [because] they tend to assume it is more accurate and objective than lay testimony'" and that "'in the mind of the typical lay juror, a scientific witness has a special aura of credibility '"[253] The court also notes that trial courts are generally granted far more discretion in deciding whether to admit expert testimony than they are with respect to fact testimony [254]

While perhaps true, these generalizations about the admissibility of scientific evidence serve little or no purpose in the constitutional analysis. In *Chambers*, the Supreme Court purposely looked beyond the trial court's characterization of the rejected testimony as hearsay to determine whether the testimony bore assurances of trustworthiness.[255] In fact, the principal error of the trial court in *Chambers* was in failing to look beyond the characterization of the evidence to consider its importance to the defendant and its reliability under the circumstances.[256] Similarly, in *Washington*, the Court rejected the state's assertion that coparticipants in a crime are, in all cases, incompetent to testify for one another.[257] This blanket rule did not account for the reliability of the testimony offered in that particular case.[258]

In *Tourlakis*, use of the balancing approach certainly would have provided a much stronger case for the introduction of the testimony Ohio's interest in its evidentiary rule was very weak. The Ohio Supreme Court had created its rule excluding testimony on the syndrome in 1981 when the syndrome itself was still being evaluated as a scientific theory in the courts.[259] By the time *Tourlakis* was decided in 1990, however, the Ohio Supreme Court had

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[251] *Id.* at 1138 (referring to the precedent established in State v. Thomas, 423 N.E.2d 137 (Ohio 1981), which was later overruled by State v. Koss, 551 N.E.2d 970 (Ohio 1990)).

[252] It is entirely possible that the court viewed itself as being in a position similar to an appellate court that reviews lower court evidentiary rulings on direct appeal for abuse of discretion only.

[253] *Tourlakis*, 738 F Supp. at 1137, 1139.

[254] *Id.* at 1139.

[255] *See* Chambers v. Mississippi, 410 U.S. 284, 298–303 (1973).

[256] *See id.*

[257] *See* Washington v. Texas, 388 U.S. 14, 22 (1967).

[258] *See id.* at 22.

[259] *See* State v. Thomas, 423 N.E.2d 137, 140 (Ohio 1981).

overruled its earlier case and had recognized, like most states, that battered woman syndrome is a well-accepted scientific theory beyond the ken of the average juror, and that testimony on the syndrome is relevant to the issue of self-defense and not overly prejudicial to the prosecution.[260]

Tourlakis's interest in presenting the testimony was quite strong.[261] Her only defense was self-defense.[262] Ohio requires that a person seeking to establish self-defense show that she *subjectively* believed that she was in imminent danger of death or grievous bodily harm at the time of the offense.[263] The testimony on the syndrome would have helped explain how Tourlakis might have believed that she was in imminent danger at the time of the offense even though she might not have appeared so to a neutral third party [264]

In *Fennell v. Goolsby*,[265] another district court fell into some of the same analytical traps as the *Tourlakis* court. One night in 1979, Karen Fennell, a 46-year-old woman, drove her car to a service station near her home in Norristown, Pennsylvania where her husband's automobile was parked.[266] She drove at his car and struck it with her own while he was in the driver's seat.[267] She then backed up, drove forward, and struck his car again.[268] Her husband escaped from the car and attempted to run to the service station, but before he was able to reach the office, she struck him with her car several times.[269] The husband was pronounced dead on arrival at the hospital.[270]

Fennell was subsequently charged with murder, voluntary manslaughter, involuntary manslaughter, aggravated assault and recklessly endangering other people.[271] At her trial, Fennell offered direct evidence of abuse she suffered at the hands of her husband. Her son testified that his father had frequently hit his mother and had threatened her with a knife.[272] Her daughter testified that her

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[260] *See* State v. Koss, 551 N.E.2d 970, 974 (Ohio 1990) (overruling *Thomas*).

[261] The expert testimony in *Tourlakis* may not have been enough to change the result of the trial. A person claiming self-defense has a duty to retreat from a known risk. *See, e.g.*, People v. Stallworth, 111 N.W.2d 742, 746 (Mich. 1961). The record in *Tourlakis* suggests that Tourlakis did not observe this duty because she repeatedly shot at Sparks, even when he was in retreat from her apartment. *See Tourlakis*, 738 F Supp. at 1131. A person is not obliged to retreat if assaulted in her dwelling, however. *See Stallworth*, 111 N.W.2d at 746.

[262] *See Tourlakis*, 738 F Supp. at 1129.

[263] *See* State v. Sheets, 152 N.E. 664 (Ohio 1926).

[264] *See infra* Part IIIC.

[265] 630 F Supp. 451 (E.D. Pa. 1985).

[266] *Id.* at 454.

[267] *Id.*

[268] *Id.*

[269] *Id.*

[270] *Id.*

[271] *Id.*

[272] *Id.* at 456.

father often harassed her mother and often would not let her sleep.[273] The petitioner herself testified to almost constant physical and mental abuse over a three- to four-year period.[274] She testified that her husband had a severe drinking problem and that he "threatened her verbally, pushed, kicked, punched, and tried to choke her."[275] On one occasion, he tried to burn her with a cigarette and he would often force himself upon her sexually.[276]

After laying this foundation, Fennell offered to present expert testimony on the battered woman syndrome. While Fennell claimed self-defense and insanity as defenses, the asserted purpose of the testimony was to support her credibility concerning the nature of her relationship with her husband.[277]

The trial court excluded the expert testimony on the basis that the expert did not have personal knowledge of the defendant's condition either before or after the killing.[278] Fennell was then convicted of voluntary manslaughter.

After exhausting her remedies in state court, she filed a petition for a writ of habeas corpus. In a lengthy opinion, the district court first determined that the reason offered by the trial court for refusing the evidence was erroneous.[279] The fact that the expert never personally examined or interviewed Fennell did not render her testimony inadmissible.[280] The court held, however, that the exclusion of the testimony did not violate defendant's right to present a defense because the testimony was not critical to a fair trial.[281] The expert testimony was only offered for the limited purpose of supporting the defendant's credibility and, therefore, the exclusion did not violate Fennell's right to present witnesses in her defense.[282]

Fennell appears to be correctly decided. The critical fact in the case is that the defendant offered the battered woman syndrome testimony only to support her own credibility and not to prove elements of a defense.[283] A less persuasive, but significant fact is that two other psychiatrists testified at trial

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[273] *Id.* at 457.

[274] *Id.*

[275] *Id.*

[276] *Id.*

[277] *Id.* at 459–60. In post-trial motions and briefs, however, Fennell asserted that the testimony would have explained how continued abuse could affect behavior, perceptions, and mental state. *Id.* at 460.

[278] *See id.* at 456.

[279] *Id.* at 457.

[280] *Id.*; *cf.* Barefoot v. Estelle, 463 U.S. 880, 903 (1983) (expert testimony regarding future dangerousness of defendant need not be based on personal examination of the defendant).

[281] *Id.* at 460–61.

[282] *Id.*

[283] *Cf.* State v. Kelly, 478 A.2d 364, 375 (N.J. 1984) (expert testimony on battered woman syndrome was admissible to bolster credibility of defendant because "[t]he credibility of [the defendant] is a critical issue in this case").

concerning Fennell's mental capacity, so that another expert's testimony on the same issue might have been cumulative.[284]

Some of the reasoning in the *Fennell* case, however, is troublesome. The court suggests, for instance, that a defendant's right to present expert testimony to support her defense is somehow of a lower order than the defendant's interest in presenting "factual testimony "[285] The court draws this conclusion after observing that in *Washington*,[286] the state had excluded the testimony of witnesses who were capable of testifying to events they had "'personally observed.'" The *Fennell* court interprets *Washington* as implying a lower level of constitutional protection for noneyewitness testimony [287]

The suggestion that a defendant's interest in presenting expert testimony should receive less constitutional protection than a defendant's interest in presenting so-called factual testimony is not well-founded. While the witness in *Washington* had "personally observed" the events giving rise to the criminal prosecution, there is no indication in *Washington* that the Court meant to suggest that factual testimony is more reliable and critical to the defense.[288] In other cases, the Court has indicated that expert testimony on the defendant's psychological condition, especially when relevant to a recognized defense, is at least as valuable as factual testimony [289]

This is particularly true in the context of the battered woman syndrome. If the fact-finder understands and gives credence to the expert testimony, the defendant may be able to establish that she acted in self-defense.[290] Without the expert testimony, a fact-finder may be unable to understand why a battered woman would not leave her mate, but would resort to violence even when her

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[284] *See Fennell*, 630 F Supp. at 461. This is somewhat less persuasive because it is not clear from the district court's opinion whether the other experts were competent or prepared to testify on the specific issue of battered woman syndrome.

[285] *See id.* at 460–61. We say "suggests" because the court is not clear about what it is driving at with its discussion of the difference between expert and so-called factual testimony.

[286] Washington v. Texas, 388 U.S. 14 (1967).

[287] *Fennell*, 630 F Supp. at 460–61 (quoting Washington v. Texas, 388 U.S. 14, 23 (1967)).

[288] If the Court were of the view that expert testimony is deserving of less constitutional protection than so-called "factual testimony," it certainly could have made this clear in a number of cases. *See, e.g.*, United States v. Nobles, 422 U.S. 225, 241 (1975), (respondent argued that the trial court's exclusion of expert testimony deprived him of his right to present witnesses in his own defense); *cf.* United States v. Nixon, 418 U.S. 683, 711 (1974) (Sixth Amendment protects defendant's right to the production of "all evidence" at a criminal trial).

[289] In Ake v. Oklahoma, 470 U.S. 68, 79–80 (1985) for instance, the Court observed that a mental health expert often plays a "pivotal role in criminal proceedings" and that the expert's testimony "may well be crucial to the defendant's ability to marshal his defense."

[290] *See supra* Part II.

batterer is in an apparently passive stage.[291] Because the expert testimony offers the fact-finder a glimpse into what may be an unfamiliar psychological condition, the testimony may be at least as valuable to the battered woman's defense as an eyewitness account of the offense itself.

C. *Syndrome Testimony in the Nontraditional Case*

Tourlakis and *Fennell* implicitly raise a larger question about whether a criminal defendant has a constitutional right to present expert testimony on the syndrome in what has been previously described as a "nontraditional" case of self-defense.[292] A "nontraditional" self-defense case is one in which the underlying facts reveal that the victim did not make a hostile demonstration of force against the defendant at the time of or immediately prior to the offense. Both *Tourlakis* and *Fennell* fit in this category In *Tourlakis*, the defendant shot at her lover even though he was not abusing her or threatening her with a weapon at the time of the offense. Similarly, in *Fennell*, the defendant killed her husband with her car at a local gas station. In both cases, but for different reasons, the trial court excluded expert testimony on the syndrome.

The trial court decisions in *Tourlakis* and *Fennell* are not unusual. Several courts have excluded testimony on the syndrome in nontraditional self-defense cases.[293] In *State v. Burton*,[294] for instance, a Louisiana court excluded testimony on the syndrome offered by the defendant to support a self-defense claim because she failed to produce "'evidence of hostile demonstration or of [an] overt act on the part of the person slain or injured,'" which is a necessary predicate in Louisiana to the introduction of any defense evidence tending to

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[291] *See supra* Part I.

[292] *See supra* Part II.

[293] *See, e.g.*, Fultz v. State, 439 N.E.2d 659, 662 (Ind. Ct. App. 1982) (exclusion of expert testimony on battered woman syndrome was proper when defendant had not made sufficient showing of imminence because defendant shot victim while sitting on a couch); People v. Aris, 264 Cal. Rptr. 167 (Cal. Ct. App. 1989) (evidence related to battered woman syndrome inadmissible when victim asleep at time of the offense); State v. Norman, 378 S.E.2d 8, 13–16 (N.C. 1989) (no error when trial court refused to instruct jury on self-defense because victim was asleep at time of offense); State v. Stewart, 763 P.2d 572, 577 (Kan. 1988) (victim asleep at time of offense). *But see* State v. Hennum, 441 N.W.2d 793 (Minn. 1989) (trial court did not rule out self-defense as a matter of law when husband-victim was sleeping and state supreme court did not discuss question in ruling on admissibility of battered woman syndrome testimony); State v. Leidholm, 334 N.W.2d 811 (N.D. 1983) (reasonableness required for self-defense measured by subjective standard, but did not define imminence in context of sleeping husband-victim); State v. Williams, 787 S.W.2d 308 (Miss. Ct. App. 1990) (syndrome evidence admissible when defendant struck out at batterer immediately after the beating).

[294] 464 So.2d 421 (La. Ct. App. 1985).

impugn the victim's character.[295] Similarly, in *State v. Norman*,[296] the North Carolina Supreme Court affirmed a trial court's decision not to instruct the jury on self-defense when the defendant was unable to produce evidence of an immediate physical threat at the time of the offense.[297] This was despite defense evidence showing years of abuse, threats to kill, and a pronounced escalation in violence in the hours leading up to the offense.

These courts are fearful that any dilution of the imminence requirement for self-defense will encourage battered women to use self-help.[298] They are also concerned that testimony on the syndrome may be prejudicial to the prosecution because it suggests to the jury that it may focus on the victim's bad character in assessing the defendant's culpability.[299]

While these concerns are legitimate and weighty, it is our view that courts which impose narrow "imminence" standards and "reasonableness" requirements will deny some defendants their constitutional right to present a defense. The Model Penal Code describes the difference between "imminent" and "immediate." A defendant must believe that her defensive action is "immediately necessary," but she "need not apprehend [that the force against which she defends] will be immediately used."[300] She need only "apprehend[] [that the force] will be used on the present occasion."[301] Courts such as those in *Burton* and *Norman*, requiring evidence of an overt act of hostility at the time of the offense, implicitly reject this standard. They require, in effect, that

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[295] *See id.* at 426 (quoting LSA-R.S. 15:482). For a discussion of Louisiana's response to the battered woman syndrome, see Rebecca Hudsmith, Note, *The Admissibility of Expert Testimony on Battered Woman Syndrome in Battered Women's Self-Defense Cases in Louisiana*, 47 LA. L. REV 979 (1987).

[296] 378 S.E.2d 8 (N.C. 1989).

[297] *Id.* at 13–16. For a valuable critique of *Norman*, including suggestions for legislative action, see Kerry A. Shad, Comment, *Survey of Developments in North Carolina Law, 1989*, State v. Norman: *Self-Defense Unavailable to Battered Women Who Kill Passive Abusers*, 68 N.C. L. REV 1159 (1990).

[298] *See Norman*, 378 S.E.2d at 15; *see also* Kinports, *supra* note 93, at 420; Rosen, *supra* note 6, at 53 (using traditional rules of self-defense in nontraditional self-defense situation would treat self-defense as an excuse rather than a justification).

[299] *See, e.g.*, *Burton*, 464 So.2d at 428–29; Chapman v. State, 386 S.E.2d 129, 131 (Ga. 1989).

[300] Model Penal Code § 3.04(1) (1985).

[301] *Id.*, *see also* State v. Hundley, 693 P.2d 475 (Kan. 1985) (reversing defendant's conviction for involuntary manslaughter because the term "immediate" rather than "imminent" appeared in the jury instructions for self-defense); State v. Wanrow, 559 P.2d 548 (Wash. 1977) (instruction limiting the jury's inquiry to the time immediately prior to a shooting was erroneous because it restricted the jury's inquiry into the surrounding circumstances). *But see* State v. Norman, 378 S.E.2d 8, 13 (N.C. 1989) (suggesting that term "imminent" is synonymous with "immediate"); People v. Aris, 264 Cal. Rptr. 167, 172 (Cal. Ct. App. 1989) (defining "imminent peril" as "immediate and present and not prospective or even in the near future").

the defendant show that the force against which she defended herself was to be *immediately* used. They do not allow for the possibility that a defendant may believe her action is immediately necessary even if she apprehends only that her batterer will use force "on the present occasion."

These courts also undervalue the principle that "imminence" should be determined from the defendant's perspective. What appears "imminent" to a battered woman may not appear "imminent" to a judge with cool hindsight. Credible scientific research suggests that battered women sometimes have a legitimate fear of imminent death or great bodily harm even when they are not being immediately threatened.[302] Some battered women are in an almost constant state of danger and fear for their lives.[303] A lull in a violent, abusive episode may be the battered woman's only opportunity to escape from a course of violence that will lead to her death or severe injury

Moreover, because the syndrome theory is centered on the idea that a reasonable person would react like the defendant under the circumstances, it is relevant even in states that have objective reasonableness standards.[304] The defendant should be given the opportunity to convince the fact-finder that her action was reasonable under the circumstances. Courts that deny the defendant this chance in some nontraditional cases are prejudging the validity of the syndrome theory These courts undermine the well-settled principle that a defendant should be permitted the widest of latitudes when introducing evidence in support of a self-defense theory, particularly when the defendant is charged with homicide.[305]

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[302] *See* WALKER, THE BATTERED WOMAN, *supra* note 19, at 75; WALKER, TERRIFYING LOVE, *supra* note 28, at 72. Even critics of scientific research on the syndrome concede that there is a "basic insight" represented by the research and that "[b]y asking only what a highly abstracted 'reasonable person' would do, the law turns a blind eye to the woman's history of abuse, to the social and economic pressures preventing her from leaving, and to her engrossing fear." Faigman, *supra* note 6, at 643.

[303] Eber, *supra* note 6, at 928–29; *see also Norman*, 378 S.E.2d at 18 (Martin, J., dissenting) ("Evidence presented in the case sub judice revealed no letup of tension or fear, no moment in which the defendant felt released from impending serious harm, even while the defendant slept.").

[304] While some states employ an objective standard of self-defense, see *supra* note 99, that standard still requires the fact-finder to consider the defendant's perception of imminence and the reasonableness of that perception. *See, e.g.*, State v. Stewart, 763 P.2d 572 (Kan. 1988).

[305] Borders v. State, 433 So.2d 1325, 1326 (Fla. Ct. App. 1983); Palm v. State, 184 So. 881 (Fla. 1938); Garner v. State, 9 So. 835 (Fla. 1891). *Compare* Barefoot v. Estelle, 463 U.S. 880, 896–903 (1983) (court properly admitted prosecution's expert psychiatric testimony on the issue of defendant's future dangerousness, despite misgivings of scientific community regarding accuracy of research, when defendant had the opportunity to cross-examine the expert witnesses or present experts of his own in rebuttal). *Cf.* Kaplan v. California, 413 U.S. 115, 121 (1973) (in exercising discretion, the trial court must be

Of course, not every nontraditional case will bring these issues into focus. In the future, the most effective constitutional challenges to the exclusion of syndrome testimony will undoubtedly arise where the facts are particularly well-suited to explanation by the syndrome theory For instance, in a case where a husband has severely abused his wife over several years and the evidence suggests that at the time of the offense, the husband had merely taken a temporary break from a course of violence designed to kill or severely injure the defendant,[306] a court may conclude that exclusion of testimony on the syndrome would deny the defendant her constitutional right to present testimony on an issue that is vital and material to her defense. On the other hand, cases where the facts reveal that the defendant hunted down her husband and killed him or hired an assassin to do the same will not, it seems, bring the issue into focus.[307]

IV. EXPERT ASSISTANCE AND THE INDIGENT DEFENDANT

The right to present expert testimony at trial is an empty one for an indigent defendant if it does not carry with it a related right to the assistance of an expert at state expense.[308] In a series of cases dating back to *Griffin v. Illinois*,[309] the Supreme Court has recognized that indigent defendants must have access to certain "fundamental tools" of due process at state expense to ensure a fair trial.[310] It is only recently, however, that the Court has considered whether a mental health expert may be one of these "fundamental tools."[311]

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guided by the principle that the "defense should be free to introduce appropriate expert testimony").

[306] *See, e.g.*, WALKER, TERRIFYING LOVE, *supra* note 28, at 117–20 (in the course of beating and pistol-whipping his wife, batterer left the room to use the restroom, warning his wife not to move; defendant shot him while he was still using the facilities).

[307] *See, e.g.*, Boyd v. State, 581 A.2d 1 (Md. 1990) (defendant paid $1800 to dynamite her husband's car); State v. Dannels, 734 P.2d 188, 191–92 (Mont. 1987) (defendant hired two men to asphyxiate her husband during a faked burglary of their motel room); State v. Martin, 666 S.W.2d 895, 899 (Mo. Ct. App. 1984) (defendant hired hit man to kill her estranged husband).

[308] *See* John F Decker, *Expert Services in the Defense of Criminal Cases: The Constitutional and Statutory Rights of Indigents*, 51 U. CIN. L. REV 574 (1982); Ephraim Margolin & Allen Wagner, *The Indigent Criminal Defendant and Defense Services: A Search for Constitutional Standards*, 24 HASTINGS L.J. 647 (1973); Katherine F Fortino, Note, *An Indigent's Constitutional Right to a State-Paid Expert*—Williams v. Martin, 16 Wake Forest L. Rev. 1031 (1980); Michael J. Yaworsky, Annotation, *Right of Indigent Defendant in State Criminal Case to Assistance of Expert in Social Attitudes*, 74 A.L.R.4th 330.

[309] 351 U.S. 12 (1956).

[310] In *Griffin*, the Court recognized that once a state offers criminal defendants the opportunity to appeal, it must provide a trial transcript to an indigent defendant if the transcript is necessary to a decision on the merits of the appeal. In Burns v. Ohio, 360 U.S.

In *Ake v. Oklahoma*,[312] the defendant was charged with murdering a couple and wounding their two children.[313] Based on his behavior before and during his arraignment, Ake was ordered by the trial judge to submit to a psychiatric examination. The psychiatrist diagnosed the accused as a paranoid schizophrenic and recommended an intensive psychiatric evaluation to determine whether he was competent to stand trial.[314] He was committed to a state hospital, and some time later the court was informed that the accused was not competent to stand trial.[315] Six weeks after that, however, the hospital reported that if the accused continued to receive his current dosage of an antipsychotic medication, he would remain stable and be competent to stand trial.[316]

At a pretrial conference, counsel for the accused informed the court that his client would raise an insanity defense. The court denied a request by Ake's counsel, however, to hire a psychiatrist at state expense.[317] At trial, the defense called each of the psychiatrists who had examined the accused at the state hospital to testify None of the psychiatrists could testify regarding his mental state at the time of the offense, however, because none had examined him with this purpose in mind.[318] The accused was convicted of two counts of first degree murder and two counts of shooting with intent to kill.[319]

252, 257–58 (1959), the Court determined that an indigent defendant may not be required to pay a fee before filing a notice of appeal of his conviction. In Gideon v. Wainright, 372 U.S. 335 (1963), the Court acknowledged that an indigent defendant is entitled to the assistance of counsel at trial, and in Douglas v. California, 372 U.S. 353 (1963), the Court extended this right to the defendant's first direct appeal as of right.

311 *See* Ake v. Oklahoma, 470 U.S. 68 (1985). Before the Supreme Court's decision in *Ake*, lower courts recognized the right to various forms of collateral assistance in preparing the defense upon a showing of particularized need. *See, e.g.*, Williams v. Martin, 618 F.2d 1021, 1025–27 (4th Cir. 1980) (forensic pathologist); Lee v. Habib, 424 F.2d 891, 899 (D.C. Cir. 1970) (funds to permit counsel to investigate case); State v. Madison, 345 So.2d 485, 490 (La. 1977). *See generally* Wanda Ellen Wakefield, Annotation, *Right of Indigent Criminal Defendant to Polygraph Test at Public Expense*, 11 A.L.R. 4th 733.

312 470 U.S. 68 (1985).

313 *Id.* at 70. For an excellent discussion of *Ake* and its implications, see John M. West, Note, *Expert Services and the Indigent Criminal Defendant: The Constitutional Mandate of* Ake v. Oklahoma, 84 MICH. L. REV 1326 (1986). For a pre-*Ake* discussion of the indigent criminal defendant's right to a psychiatric expert at state expense, see Dean C. Gramlich, Note, *An Indigent Criminal Defendant's Constitutional Right to a Psychiatric Expert*, 1984 ILL. L. REV 481 (1984).

314 *Ake*, 470 U.S. at 71.

315 *Id.*

316 *Id.*

317 *Id.* at 72.

318 *Id.*

319 *Id.* at 73.

At the sentencing hearing, the state asked for the death penalty.[320] The prosecution relied upon the testimony of the state psychiatrists to show the accused was dangerous and likely to remain so.[321] The accused had no expert witnesses to rebut this testimony or to offer evidence in mitigation.[322] The jury sentenced him to death on each of the two murder counts and 500 years imprisonment on each of the shooting with intent to kill counts.[323] The conviction and sentences were affirmed on appeal,[324] and the United States Supreme Court granted certiorari.[325]

In its opinion reversing the decision of the trial court, the Supreme Court acknowledged that fundamental fairness entitles indigent defendants to an "'adequate opportunity to present their claims fairly within the adversary system.'"[326] Indigent defendants have an "adequate opportunity" to present their claims only when they are provided with the "basic tools" of an adequate defense.[327]

To determine whether a "tool" requested by the accused is "basic" or essential to fundamental fairness, the Court took three factors into account. First, it considered the private interest that would be affected by the action of the State.[328] Second, it weighed the governmental interest that would be affected if the safeguard were provided.[329] Third, it considered the probable value of the additional or substitute procedural safeguards that were sought, and the risk of an erroneous deprivation of the affected interest if those safeguards were not provided.[330]

As to the first factor, the Court said that "[t]he private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at

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320 *Id.*

321 *Id.*

322 *Id.*

323 *Id.*

324 *See id.* (citing 633 P.2d 1 (Okla. Crim. App. 1983)).

325 465 U.S. 1099 (1984).

326 *Ake*, 470 U.S. at 77 (quoting Ross v. Moffitt, 417 U.S. 600, 612 (1974)). While *Ake* is founded on the Due Process Clause, the Illinois courts have suggested that there also may be a Sixth Amendment right of an indigent defendant to the assistance of a state-paid expert. *See* People v. Watson, 221 N.E.2d 645 (Ill. 1966); People v. Nichols, 70 Ill. App. 3d 748 (1979) (trial court's refusal to provide funds to the defendant for obtaining psychiatric evaluation of his sanity at the time of the offense deprived the defendant of his Sixth Amendment right to compel the attendance of witnesses).

At least one commentator has criticized the Illinois courts, however, for "needlessly overextend[ing] the principles embodied in the sixth amendment." *See* Gramlich, *supra* note 313, at 496.

327 *Ake*, 470 U.S. at 77 (quoting Britt v. North Carolina, 404 U.S. 226, 227 (1971)).

328 *Id.* at 78.

329 *Id.* at 78–79.

330 *Id.* at 79–80.

risk is almost uniquely compelling."[331] In contrast, the State's argument that it would be a "staggering burden" to provide psychiatric assistance to all qualified defendants was unpersuasive.[332] The Court noted that such assistance was currently provided by the federal government and many states with apparently no excessive burden.[333] Aside from the economic consequences, the state's interest in prevailing at trial was "necessarily tempered by its interest in the fair and accurate adjudication" of criminal trials.[334] Finally, as to the probable value of the assistance sought, the Court observed "that when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be *crucial* to the defendant's ability to marshal his defense."[335] Without the ability of the defense to offer its own expert evidence, "the risk of inaccurate resolution of sanity issues is extremely high."[336]

The Court imposed a significant limitation on the right to psychiatric assistance, however. It is only when the "defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, [that] the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense."[337]

Ake should have a profound effect on the ability of indigent defendants to obtain expert assistance and testimony on the battered woman syndrome. The same "privacy interest" in the accuracy of criminal proceedings that was at stake in *Ake*[338] is present in cases in which the defendant seeks to prove self-defense through battered woman syndrome evidence. The financial burden to the state of providing such assistance is a question that is open for debate and beyond the scope of this Article.[339] Suffice it to say here, however, that the

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[331] *Id.* at 78.

[332] *Id.*

[333] *Id.* at 79 n.5 (citing 18 U.S.C. § 3006A(e)(1), which provides expert assistance to a criminal defendant in a *federal* prosecution when it is necessary for an adequate defense).

[334] *Id.*

[335] *Id.* at 80 (emphasis added).

[336] *Id.* at 82.

[337] *Id.* at 83. For a critique of this "significant factor" test in the context of non-psychiatric expert assistance, see A. Michelle Willis, *Nonpsychiatric Expert Assistance and the Requisite Showing of Need: A Catch-22 in the Post-*Ake *Criminal Justice System*, 37 EMORY L.J. 995 (1988).

A federal circuit court case decided after *Ake* notes that when an indigent defendant makes a clear showing that his mental condition will be a significant factor at trial, the judge has a clear duty to appoint a psychiatric expert to assist in the defense of the case *even if* a psychiatrist has been previously appointed to examine the defendant at the request of the government. *See* United States v. Sloan, 776 F.2d 926, 928–29 (10th Cir. 1985).

[338] *Ake*, 470 U.S. at 78.

[339] It appears that the burden of providing expert assistance on the syndrome would not be "staggering." *See, e.g.*, West, *supra* note 313, at 1339 n.93 (discussing "modest

Supreme Court's comment in *Ake* about the financial burden of providing similar assistance in insanity-defense cases appears to be equally applicable here: the state's interest in the economic consequences of providing expert assistance to an indigent defendant must be tempered by its interest in fair and accurate adjudication.[340] And in the battered woman syndrome context, as in the insanity defense context, the expert's assistance "may well be crucial to the defendant's ability to marshal [a] defense."[341]

Of course, the limitations on the expert assistance in *Ake* should also be applicable in the context of the battered woman syndrome. A defendant must demonstrate to the trial judge that testimony on battered woman syndrome will be a significant factor in her defense before she will be granted access to an expert at public expense.[342] What is "significant" obviously will have to be decided on a case-by-case basis.[343]

V. CONCLUSION

A mythology has grown up around the subject of spousal abuse. The mythology holds that battered women are free to leave their abusive mates but choose to stay, that battered women sometimes enjoy the abuse they endure, and that battered women do something to provoke the abuse.

The studies about the battered woman syndrome contradict these myths. Research on the syndrome suggests that abusive relationships follow a cyclical pattern and that battered women often suffer from learned helplessness and

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annual costs for *all* expert services incurred by the federal government and a sample of states").

[340] *Ake*, 470 U.S. at 78.

[341] *Id.* at 80; *see also* State v. Kelly, 478 A.2d 364, 376 (N.J. 1984) (excluded expert testimony on battered woman syndrome was "central to the defendant's claim of self-defense, [and] its exclusion, if otherwise admissible, [could not] be held to be harmless error"). *See generally* Richard J. Bonnie & Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Justice Process: The Case for Informed Speculation*, 66 VA. L. REV 427 (1980).

[342] *See Ake*, 470 U.S. at 82-83. This has been described as a "presumed need" standard. *See* West, *supra* note 313, at 1357 (citing Margolin & Wagner, *supra* note 308, at 644-65). Under this standard, "[o]nce the defendant has shown that the relevant issue exists, no further particularized showing is necessary." *Id.* at 1358.

[343] The most significant case on this issue so far is Dunn v. Roberts, 768 F. Supp. 1442 (D. Kan. 1991). In *Dunn*, the United States District Court for the District of Kansas cited *Ake* in holding that the petitioner's due process right had been abridged when the trial court denied her request for expert assistance on the battered woman syndrome in order to prove a defense of compulsion.

In State v. Aucoin, 756 S.W.2d 705 (Tenn. 1988), the defendant was denied state funds to obtain the assistance of an independent psychiatrist with knowledge of the battered woman syndrome. *See also* State v. Dannels, 734 P.2d 188 (Mont. 1987) (defendant requested funds to retain specific psychiatric expert and was denied).

other psychological disorders associated with intensive and prolonged abuse. Battered women feel trapped by abuse. They often feel worthless and powerless and perceive their mates to be omnipotent.

Despite the growing acceptance of the syndrome theory in the criminal justice system, some courts are reluctant to admit testimony on the syndrome in nontraditional self-defense cases. This reluctance is also manifested in an unwillingness to provide state-funded access to experts on the syndrome to indigent defendants. These courts are concerned that the imminence requirement of self-defense may become watered down by testimony on the syndrome and that this testimony may bear more upon the character of the victim than the innocence of the defendant.

The exclusion of the testimony in some nontraditional cases, however, may violate the accused's constitutional right to present a defense. Expert testimony on the syndrome generally is favorable and material to the defense. State rules excluding syndrome testimony for lack of an "overt act" of hostility on the part of the victim, or for similar reasons, are susceptible to the charge that they arbitrarily exclude vital defense evidence. A battered woman may reasonably believe herself to be in imminent danger and unable to retreat even when her spouse is not engaged in an overt act of violence at the time of the offense. To suggest otherwise is to hold onto a narrow and outdated conception of what is "imminent" and what is "reasonable" in the context of an abusive relationship.

"The law cannot be allowed to be mired in antiquated notions about human responses when a body of knowledge is available which is capable of providing insight."[344]

[344] Thomas v. Arn, 728 F.2d 813, 815 (6th Cir. 1984) (Jones, J., concurring).